

**No. 275.**

**A. B. CROWL, PLAINTIFF IN ERROR.**

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THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
PENNSYLVANIA.

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## 1 In the Court of Quarter Sessions of Erie County, Pennsylvania.

No. 32, September Sessions, 1911.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Copy Docket Entry.*

Indictment: Selling adulterated ice-cream.

G. M. Pelton, Prosecutor.

Defendants and C. L. Alexander each held in \$200.00.

Sept. 12", 1911.—A true bill.

Nov. 15, 1911.—Case called, Hon. E. A. Walling, P. J., on the bench; same day Jury called and empanelled.

Nov. 15", 1911.—Motion made by the Defendants to Quash Indictment. Motion granted; see Stenographer's notes. Per Curiam.

Indictment: Selling ice cream deficient in butter fat.

Nov. 15", 1911.—A true bill.

Nov. 15", 1911.—Demurrer to the Indictment filed by the defendants. Demurrer overruled. Per Curiam, W.

To which same day the defendants except and an exception is sealed. Emory A. Walling, P. J. (L. S.)

Nov. 15", 1911.—The defendants plead not guilty, same day Jury called, empanelled and sworn, viz: Alex H. Donnell, James J. Fitzgerald, Clyde Z. Smiley, W. Marsh, John F. Zimmerman, J. M. Dougherty, W. A. McCray, Smith Brennan, Geo. W. Kibler, James Wetsel, Albert Keller and Roger Withrow, who say Nov. 16", 1911, they find the defendant W. F. Lewis not guilty and the defendant A. B. Crowl guilty as indicted.

Nov. 20", 1911.—Upon motion of the defendant in arrest of judgment, Rule to show cause granted. Per Curiam, W.

Nov. 20, 1911.—Upon motion for a new trial, rule to show cause granted, Defendant to have 15 days in which to file his reasons for the same. Per Curiam, W.

2 Nov. 20", 1911.—Recognizance forfeited and respited to Feb'y Sessions, 1912.

Dec. 2", 1911.—Motion of G. T. Kincaid, Att'y for Defendant, for 20 days' additional time in which to file exceptions filed.

And now, Dec. 2", 1911, Motion granted and 20 days' additional time allowed defendant to file exceptions for a new trial allowed. By the Court, W.

Dec. 2, 1911.—Motion for order authorizing and directing Court Stenographer to file record filed.

And now, Dec. 2, 1911—Motion granted and the Court Stenographer is hereby directed to write out or transcribe, and file of record his notes of testimony, judge's charge, etc., in above action. By the Court, W.

Jan. 18", 1912, Notes of testimony filed.

Jan. 25, 1912.—Reasons for new trial filed.

June 24", 1912—Opinion of Emory A. Walling, P. J. filed with the following order: And now, June 24, 1912, the rule for a new trial and also the rule in arrest of Judgment in above stated case are discharged. Per Curiam, W.

To which same day the defendant excepts and an exception is sealed. Emory A. Walling, P. J. (L. S.)

And now, July 1, 1912, the sentence of the Court is that the defendant A. B. Crowl pay a fine of Twenty-five dollars to the Dairy and Food Commissioner or his agent for the use of the Commonwealth and pay the costs of prosecution or give security to the Sheriff to pay the same within ten days, and stand committed until this sentence is complied with. Per Curiam.

To which same day the defendant excepts and an exception is sealed. Emory A. Walling, P. J. (L. S.)

Upon petition for a supersedeas, the Court made the following order: And now, July 1, 1912, it is ordered that the sentence in the within case be stayed until an appeal can be taken by the said defendant, and thereafter said appeal to be a supersedeas to stay the sentence imposed until the said appeal can be determined and disposed of. Bond required in \$200.00. Per Curiam, W.

July 3, 1912, Bond on Appeal to the Superior Court of Penna. in the sum of \$200.00 with A. B. Crowl as principal, and C. L. Alexander as surety, filed.

July 15", 1912, Certiorari to the Court of Quarter Sessions for the County of Erie, returnable the first Monday of August A. D. 1912, filed in the office of the Clerk of Courts of Erie County.

4 STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

I, H. P. Gillett, Clerk of the Quarter Sessions Court in and for the County of Erie, State of Pennsylvania, do hereby certify that the foregoing pages contain a true and correct — of the docket entry in the matter of the case of Commonwealth of Pennsylvania versus A. B. Crowl and W. F. Lewis, as appears by the record in said case, No. 32, September Sess., 1911 as full and entire as the same remains of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Court, at Erie, this 25th day of July, A. D. 1912.

[SEAL.]

H. P. GILLETT,  
*Clerk of Court of Quarter Sessions.*

5 STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

[SEAL.]

I, H. P. Gillett, Clerk of the Quarter Sessions Court in and for said County, do hereby certify that the above and foregoing pages contain a true copy and correct transcript of the record and pro-



ceedings in said case, No. 32 September Sessions, 1911, as full and entire as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said Court at Erie, the 25th day of July, A. D. 1912.

H. P. GILLETT,  
*Clerk Court of Quarter Sess.*

STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

I, Emory A. Walling, President Judge of the Sixth Judicial District (or Circuit), composed of the County of Erie, do certify that ——— whose name appears to the above and foregoing certificate, is the Clerk of the Court of Quarter Sessions of the County of Erie, and the seal by him thereto affixed is the seal of said Court; and also, that his attestation of the said record is in due form.

Witness my hand and seal this 25th day of July, A. D. 1912.

EMORY A. WALLING, [L. s.]  
*President Judge.*

STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

[SEAL.]

I, H. P. Gillett, Clerk of the Quarter Sessions Court in and for said County, do certify that the Hon. Emory A. Walling is now, and was at the time of signing the above certificate, President Judge of the Sixth Judicial District of said Commonwealth, composed of the County of Erie, duly commissioned and qualified according to law, and that his signature to the said certificate is genuine.

6 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Erie, this 25th day of July, A. D. 1912.

H. P. GILLETT,  
*Clerk Court of Quarter Sessions.*

7 COMMONWEALTH OF PENNSYLVANIA

vs.

A. B. CROWL and W. F. LEWIS.

Warrant issued 14th day of August, 1911, by Charles Klemm, Alderman, to John Flannigan, Constable; Oath of G. M. Pelton, Charging defendant with of selling Chocolate Ice Cream less than 8 per centum of Butter Fat.

*Costs.*

Information .....	.60
War. A .....	.60
Docket Entry .....	.50
Issuing .....	.75
2 oaths .....	.20
Transcript .....	.75

Bail .....	.50
Bail .....	.50
	<hr/>
	4.40
Witnesses:	
G. M. Pelton .....	3.92
John A. Evans.....	.56
	<hr/>
	4.48
Constable John Flannigan Serv. Warr't.....	2.00
Mileage .....	4.56
	<hr/>
	6.56
	<hr/>
Total.....	15.44

Before me the subscriber, personally appeared G. M. Pelton, who being duly sworn according to law deposes and says, that on the 21st day of June, A. D. 1911, A. B. Crowl and W. F. Lewis at Corry, in the County aforesaid, did unlawfully by himself, herself, itself, or themselves, or by his, her, its or their agents, servants or employes, manufacture, sell, offer for sale, expose for sale, and had in their possession with intent to sell, a certain article, to-wit—Chocolate Ice Cream which then and there contained less than 8 per centum butter-fat, contrary to the provisions of the Act of the General Assembly of the Commonwealth of Pennsylvania, approved the twenty-fourth day of March, A. D. 1909.

And now Aug. 30th, 1911, comes M. L. Davis, Attorney for the Complainant and moves the Alderman to amend the information in this case by inserting after the word "Butter-fat" in the eleventh line thereof, the following; "and not then and there being flavored with fruit or nuts."

Sworn and subscribed to before me this 30th day of August, 1911, by G. M. Pelton the Prosecutor.

Def'ts object to the amendment, and amendment allowed, the objection over-ruled, in favor of the prosecution.

Aug. 30th, 1911, Def'ts refuse to plead, and the Alderman enters a plea of not Guilty.

G. M. Pelton sworn for Commonwealth and James A. Evans sworn for Commonwealth.

After hearing all proofs, Def'ts held in the sum of (\$200.00) Bail each to answer next term of Quarter Session.

Def'ts give bail.

Each held in the sum of \$200.00 each, conditioned that Defendant shall appear at next Court of Quarter Sessions of Erie County to answer above charge, and not depart said Court until discharged by due course of law. A. B. Crowl and W. F. Lewis, and C. L. Alexander, each held in the sum of — to appear and testify in above stated case.

ERIE COUNTY, ss:

I hereby certify that above is a correct Transcript of the proceedings had before me in above cause, and of record on my docket. In testimony whereof, I have hereunto set my hand and seal at Erie the 1st day of September 1911.

CHARLES KLEMM, *Alderman*. [SEAL.]

Endorsement: In the Court of Quarter Sessions of Erie County—Sept. Term 1911 No. 32—Commonwealth vs. A. B. Crowl and W. F. Lewis—Before Charles Klemm Alderman—Charge: Violating Pure Food Law.

8. In the Court of Quarter Sessions of the Peace for the County of Erie.

32, September Sessions, 1911.

COUNTY OF ERIE, ss:

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Erie, upon their respective oaths and affirmations, do present, That A. B. Crowl and W. F. Lewis late of Said county, yeomen, on the twenty-first day of June, in the year of our Lord one thousand nine hundred and eleven, with force and arms, at the county aforesaid and within the jurisdiction of this Court, did unlawfully, by himself and themselves, and by his and their agents, servants and employes, sell, offer for sale, expose for sale, and have in their possession with intent to sell, ice-cream which was then and there unlawfully adulterated in the manner following, to-wit:

By containing less than eight per centum of butter fat and not being then and there flavored with fruit or nuts, Contrary to the form of the Act of the General Assembly in such cases made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

W. FITT GIFFORD,  
*District Attorney*.

Endorsement: No. 32 September Sessions 1911.—Commonwealth of Pennsylvania vs. A. B. Crowl and W. F. Lewis—Indictment for Selling adulterated ice-cream. Misdemeanor.—A true bill—Wm. Hopkins, Foreman, Sept. 12th, 1911—And now, to-wit: A. D. 190—The Defendant being arraigned, plead—(Indct. quashed) G. M. Pelton, Prosecutor—Witnesses G. M. Pelton James A. Evans.

9 In the Court of Quarter Sessions of the Peace for Erie  
County, State of Pennsylvania.

No. 32, September 1911, Session 19—.

COMMONWEALTH

VS.

A. B. CROWL et al.

*Commonwealth's Bill of Costs, September, 1911, Session 19—*

Name.	Miles direct travel, @ cts.	Amount.	Attendance in days, \$1.50.	Total am't due.	Received the amount opposite my name.	Date pay- ment.
G. M. Pelton.....	58	3.48	1	4.98		
James A. Evans..	....	.....	1	1.50		
F. T. Aschman...	148	8.88	1	10.38		
Clerk's fee for certifying bill.....				.25		
Whole amount of bill.....				<u>\$17.11</u>		

ERIE COUNTY, ss:

Personally appeared before me F. H. Watson who being duly sworn, saith the above bill of costs is correct, that the witnesses named were necessary, material and in attendance as above stated.

R. H. WATSON.

Sworn and subscribed in open Court this 12 day of Sept. 1911.

H. P. GILLETT, Clerk.

I hereby certify That the within named witnesses were subpoenaed by my order, were in attendance, and deemed necessary and material to the trial of the case.

\_\_\_\_\_,  
District Attorney.

\_\_\_\_\_, 19—.

Endorsement: No. 32, September Session, 1911—Commonwealth  
vs. A. B. Crowl et al.—Commonwealth's Bill of Costs—Filed Sept.  
12, 1911.

10 ERIE COUNTY, ss:

[SEAL.]

The Commonwealth of Pennsylvania to G. M. Pelton, James A.  
Evans, F. T. Aschman, Greeting:

We command you, and each of you, that, setting aside all business  
and excuses, you be and appear in your proper persons before our

Judges at Erie, at a Court of General Quarter Sessions of the Peace, to be holden for the County of Erie, the 12th day of September 1911, at the hour of 2 o'clock P. M. next, to testify all and singular those things you know between us and A. B. Crowl et al. on an indictment for Violation Pure Food Laws on the part of the Commonwealth, and this you are not to omit under a penalty of one hundred pounds.

Witness the Hon. Emory A. Walling, President Judge of our said Court, at Erie, the 5th day of September in the year of our Lord, one thousand nine hundred and eleven.

H. P. GILLETT, *Clerk*.

Endorsement: No. 32 September Sess. 1911—Commonwealth vs. A. B. Crowl et al.—Subpoena on part of Commonwealth, Erie, Pa., Sept. 8 and 12, 1911—Served personally on Within Named Witness. Fees: Service on one witness at \$.50—\$.50, Service on 2 witnesses at 15¢=30c., 1 Miles direct travel at 12¢=12¢ \$.92—F. H. Watson Sworn and subscribed before me this 13 day of Sept. 1911. H. P. Gillett, Clerk.

11 In the Court of Quarter Sessions, Erie County, Pennsylvania,  
— Term, 1911.

No. —.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Demurrer.*

And, now, November 15, 1911, the above named defendants by Walter Jeffreys Carlin and Gerry Kincaid, their attorneys, demurr to the indictment in the above stated case, and say that the indictment is not sufficient in law to maintain a charge upon which the defendants could be convicted and, in support of this demurrer, assign the following reasons:

1. That the indictment does not charge a crime.
2. That no Act of of the General Assembly makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.
3. That the indictment does not contain a specific description of the offense and does not described the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.
4. That the food acts of March 24, 1909, and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecution for its violation and is therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.



5. That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioner as required by the act, but, on the contrary, shows that it was not commenced by said official.

6. So much of the complaint and indictment as sets forth any charge other than actual sale of ice cream should be quashed and dismissed for the reason that the statute does not make it an offense to "manufacture"—"offer for sale"—"expose for sale"—"have in his possession with intent to sell"—ice cream which violates section 4 of the Act of General Assembly of the Commonwealth of Pennsylvania, approved the 24th day of March, 1909. The provisions in section 1 of said act only apply to section 2 thereof, which defines adulterations. Section 4 does not define adulteration, it fixes a standard for which a penalty for the violation thereof is provided by section 6.

7. So much of the information or complaint and indictment as charges that the sale was by an agent, servant or employee should be dismissed for the reason that the statute does not make it an offense to sell ice cream which violates section 4 of the above named act by an agent, servant or employee. These provisions of section 1 only apply to section 2 of said act which defines adulteration. Section 4 does not define an adulteration, it fixes a standard and a penalty is provided in section 6 and that is merely a penalty for a personal sale.

8. That as the statute does not make it an offense to sell by an agent, servant or employee, ice cream in violation of section 4 of the said act, but in fact whether the statute does or not make such an act an offense, the information or complaint is in a disjunctive form, making the charge indefinite and uncertain and the information fails to charge a crime for the reason that it does not show whether the offense was committed by the defendants or by one of their agents, servants or employees.

9. That the act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the amendments to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.

10. That the act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.

Wherefore defendants ask that the Demurrer be and that they be discharged.

WALTER JEFFREYS CARLIN,  
GERRY KINCAID,

*Attorneys for Defendants.*

Endorsement: No. 32 Sept. 1911—November 15, 1911. Demurrer overruled Per Curiam W.—To which same day the defendants except and an exception is sealed. Emory A. Walling. (L. S.) P. J.—Gerry T. Kincaid, Blaine Kincaid, Attorneys-at-law, National Bank Building, Corry, Pa.

14 In the Court of Quarter Sessions of Erie County.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

Charge: Selling Adulterated Ice Cream.

Now comes the defendants by Walter Jeffreys Carlin and Gerry Kincaid, their attorneys, and move to quash the indictment and for the discharge of the defendants and for grounds of said motion state the following:

1. That the information or complaint filed does not charge a crime and that the indictment does not charge a crime.

2. That no act of the General Assembly makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.

3. That the indictment does not contain a specific description of the offense and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.

4. That the food acts of March 24, 1909, and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecution for its violation and is therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.

5. That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioner as required by the act, but, on the contrary, shows it was not commenced by said official.

15 6. So much of the complaint and indictment as sets forth any charge other than an actual sale of ice cream should be quashed and dismissed for the reason that the statute does not make it an offense to "manufacture"—"offer for sale"—"expose for sale"—"have in his possession with intent to sell"—ice cream which violates section 4 of the act of General Assembly of the Commonwealth of Pennsylvania, approved the 24th day of March, 1909. The provisions in section 1 of said act only apply to section 2 thereof, which defines adulterations. Section 4 does not define adulteration, it fixes a standard for which a penalty for the violation thereof is provided by section 6.

7. So much of the information or complaint and indictment as charges that the sale was by an agent, servant or employee should be dismissed for the reason that the statute does not make it an offense to sell ice cream which violates section 4 of the above named act by an agent, servant or employee. These provisions in section 1 only apply to section 2 of said act which defines adulteration. Section 4 does not define an adulteration, it fixes a standard and a

penalty is provided in section 6 and that is merely a penalty for a personal sale.

8. That as the statute does not make it an offense to sell by an agent, servant or employee, ice cream in violation of section 4 of the said act, but in fact whether the statute does or not make such an act an offense, the information or complaint is in a disjunctive form, making the charge indefinite and uncertain and the information

16 fails to charge a crime for the reason that it does not show whether the offense was committed by the defendant or by one of his agents, servants or employees.

9. That the act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the amendments to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.

10. That the act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.

Wherefore defendants ask that the indictment be quashed and that they be discharged.

WALTER JEFFREYS CARLIN,  
GERRY KINCAID,

*Attorneys for Defendant.*

Endorsement: #32 Sept. 1911—Quarter Sessions—Erie County—Commonwealth vs. A. B. Crowl & W. F. Lewis—Original Motion to Quash Indictment—Walter Jeffreys Carlin, Attorney for Defendants, 2 Rector Street, New York City—Borough of Manhattan—Due and timely service of a copy of the within — is this — day of — 191— hereby admitted. — — —, Attorney for — — —. Nov. 15 1911. Motion granted, Per Curiam. See Stenographer's notes.

17 In the Court of Quarter Sessions of the Peace for the County of Erie.

November Sessions, 1911.

COUNTY OF ERIE, ss:

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Erie, upon their respective oaths and affirmations, do present, That A. B. Crowl and W. F. Lewis late of said county, yeomen on the twenty-first day of June in the year of our Lord one thousand nine hundred and eleven with force and arms, at the county aforesaid and within the jurisdiction of this Court, did unlawfully, by himself and themselves, and by his and their agents, servants and employees, sell, offer for sale, expose for sale, and have in their possession with intent to sell, a certain article to-wit, chocolate ice-cream, which then and there contained less than eight per centum butter-fat, and not then and there

being flavored with fruit or nuts. Contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

W. PITT GIFFORD,  
*District Attorney.*

Endorsement: No. 32 September Sessions 1911—Commonwealth of Pennsylvania vs. A. B. Crowl and W. F. Lewis—Indictment for selling ice-cream deficient in butter-fat Misdemeanor—A true bill—J. W. Bonnell Foreman—Nov. 15, 1911—And now, to-wit: Nov. 15 A. D. 1911 the Defendants being arraigned, plead not guilty, G. T. Kincaid, W. J. Carlin Attys. for Dft. G. M. Pelton Prosecutor.—Witnesses G. M. Pelton, James A. Evans, F. T. Aschman.

8 In the Court of Quarter Sessions of Erie County, Pa.

No. —, Term 1911.

COMMONWEALTH

VS.

A. B. CROWL and W. F. LEWIS.

The defendants by their attorneys respectfully request the Court to charge the jury as follows:

1. That the defendants are presumed to be innocent until proven guilty.
2. That the burden of proof is upon the Commonwealth to establish the guilt of the defendants.
3. That unless the jury find from the evidence that the defendants are guilty beyond any reasonable doubt the defendants should be acquitted.
4. That each and every juror should be satisfied beyond any reasonable doubt of the guilt of the defendants before bringing in a verdict of guilty.
5. That the Act of Assembly under which the indictment is drawn has been repealed by the Act of Assembly of May 13, 1909, and therefore the verdict of the jury must be not guilty.
6. That unless the jury find from the evidence that the product sold was chocolate ice cream the verdict of the jury must be not guilty.
7. That unless the jury find from the evidence beyond a reasonable doubt that fruit or nuts were not used for flavoring in the product sold the verdict of the jury must be not guilty.
8. That if the jury find from the evidence that the guilt or innocence of the defendants depends upon the accuracy or completeness of a chemical analysis of the substance sold, that they should be satisfied beyond any reasonable doubt that said analysis was accurate and complete before convicting the defendants.
9. That unless the jury find beyond any reasonable doubt that the

product sold was ice cream, and that it contained less than eight per cent butter fat the verdict of the jury should be not guilty.

10. That the Act of Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Sec. 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same.

11. That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same.

12. That unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted.

13. That the evidence offered on the part of the commonwealth is not sufficient to warrant the jury in finding W. F. Lewis one of the defendants guilty.

14. That under the law and the evidence the verdict of the jury must be not guilty.

W. J. CARLIN,  
G. T. KINCAID,  
*Att'ys for D'fts.*

20 In the Court of Quarter Sessions of the Peace of Erie County,  
Pa., September Session, 1911.

No. 32.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS, Defendant.

We, the jury empanelled and sworn to try the issue joined between the Commonwealth of Pennsylvania, and A. B. Crowl and W. F. Lewis, Find Defendant W. F. Lewis Not Guilty; A. B. Crowl Guilty as indicted.

C. Z. SMILEY, *Foreman.*

Date Nov. 16, 1911.

Endorsement: No. 32. Sept. Term 1911—Commonwealth vs. A. B. Crowl and W. F. Lewis—Verdict of the Jury at Session, 19—.



21 In the Court of Quarter Sessions of the Peace for Erie County, State of Pennsylvania, September Session, 1911.

No. 32.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Commonwealth's Bill of Costs, November Session, 1911.*

Name.	Miles direct travel, @ cts.	Amount.	Attendance in days, \$1.50.	Total am't due.	Received the amount opposite my name.	Date payment.
G. M. Pelton.....	58	3.48	2	6.48		
James J. Evans..	....	.....	2	3.00		
F. T. Aschman...	148	8.88	3	13.38		
Clerk's fee for certifying bill.....				.25		
Whole amount of bill.....				\$23.11		

ERIE COUNTY, ss:

Personally appeared before me G. M. Pelton who being duly sworn, saith the above bill of costs is correct, that the witnesses named were necessary, material and in attendance as above stated.

G. M. PELTON.

Sworn and subscribed in open Court this 16 day of Nov., 1911.

H. P. GILLETT, *Clerk.*

I hereby certify That the within named witnesses were subpoenaed by my order, were in attendance, and deemed necessary and material to the trial of the case.

\_\_\_\_\_,  
*District Attorney.*

—, 19—.

Endorsement: No. 32. September Session, 19— Commonwealth vs. A. B. Crowl, et al.—Commonwealth's Bill of Costs—Nov. 16, 1914. Filed.

22 In the Court of Quarter Sessions of Erie County, Pa., Term,  
1911.

No. —.

COMMONWEALTH

VS.

A. B. CROWL and W. F. LEWIS.

*Motion in Arrest of Judgment.*

And, now, November 20, 1911, comes W. J. Carlin and G. T. Kincaid, Attorneys for A. B. Crowl, the above named defendant, and move the Court for a- arrest of judgment in the above entitled case, and in support of the same assign the following reasons:—

1. That the indictment does not charge a crime.
2. That no Act of the General Assembly of Pennsylvania makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the Act approved March 24, 1909, was repealed by the enactment of the so called pure food law approved May 13, 1909.
3. That the indictment does not contain a specific description of the offense, and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.
4. That the food Acts of March 24, 1909 and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecutions for the violation of the same and are therefore unconstitutional and void under the constitution of the United States and of the Constitution of Pennsylvania.
5. That neither the complaint nor indictment shows that the prosecution was commenced by the Dairy & Food Commissioner, as required by the Act, nor by his direction, or by any one in his employ, but on the contrary shows that it was not commenced by said official.
6. That the indictment is too indefinite on which to sustain a conviction in that it charges that said defendants did sell,  
23 offer for sale, expose for sale, and have in possession with intent to sell, ice cream which violates section 4 of the Act of Assembly, approved March 24, 1909. Whereas the provisions of Sec. 1, of said Act making it an offense to offer for sale, expose for sale, and have in possession with intent to sell, & apply to the 2nd Section of said Act, and not to the 4th Section of the same.
7. That the Act of Assembly of March 24, 1909, known as the Ice Cream Act, in that it attempts in Section 4, of the same, to establish a standard for butter fat in ice cream, and absolutely prohibits the sale of ice cream containing less than the standard of butter fat, no matter how wholesome, is unconstitutional.
8. That the Act under which the indictment is drawn is invalid and unconstitutional and void in that it violates Section 1, Article 14, of the amendments to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the

United States and deprives them of liberty and property without due process of law and denies them the equal protection of the Law.

10. That the Act, under which the indictment is drawn is unconstitutional and void under the Constitution of Pennsylvania.

Wherefore defendant asks that said motion be sustained and defendant be discharged.

W. J. CARLIN,  
G. T. KINCAID,  
*Attorneys for Defendant.*

Endorsement: Commonwealth vs. A. B. Crowl, W. F. Lewis—  
Motion in Arrest of Judgment—Nov. 25 1911—Rule to show cause  
granted Per Curiam W—Filed in Clerk of Court's Office Erie Co.  
Pa. Nov. 20, 1911—Gerry T. Kincaid, Blaine Kincaid Attorneys  
at law, National Bank Building Corry, Pa.

24 In the Court of Quarter Sessions of Erie County, Pa.

No. —, — Term, 1911.

COMMONWEALTH  
vs.  
A. B. CROWL and W. F. LEWIS.

*Motion for New Trial.*

And now Nov. 20, 1911, comes W. J. Carlin and G. T. Kincaid,  
Attorneys—A. B. Crowl, above named defendant, and move the  
Court for a new trial in the above case.

W. J. CARLIN,  
G. T. KINCAID,  
*Attorneys for Defendant.*

And now Nov. 20, 1911, rule to show cause granted why the  
defendant A. B. Crowl should not have a new trial. Defendant to  
have 15 days in which to file his reasons for the same.

PER CURIAM.  
W.

Endorsement: Commonwealth vs. A. B. Crowl, W. F. Lewis—  
Motion for New Trial—Filed in Clerk of Court's Office Erie Co. Pa.  
Nov. 20, 1911—Gerry T. Kincaid Blaine Kincaid Attorneys at law  
National Bank Building Corry, Pa.

25 In the Court of Quarter Sessions of Erie County, Pa.

No. —, — Term, 1911.

COMMONWEALTH

VS.

A. B. CROWL and W. E. LEWIS.

And now Dec. 2, 1911, comes G. T. Kincaid Attorney for defendant and moves the Court for an order authorizing and directing the Court Stenographer to transcribe or write out and file of record his notes in the above entitled action including, notes of testimony judge's charge, etc.

G. T. KINCAID,  
*Att'y for D'ft.*

And now Dec. 2, 1911, motion granted and the Court Stenographer is hereby directed to write out or transcribe and file of record his notes of testimony, judge's charge, etc. in above action.

BY THE COURT.  
W.

Endorsement: No. 32 Sept. Term, 1911—Commonwealth vs. A. B. Crowl—Motion directing Court Stenographer to file Notes of Testimony, etc.—Kincaid.

26 In the Court of Quarter Sessions in Erie County, Pa.

No. —, — Term, 1911.

COMMONWEALTH

VS.

A. B. CROWL and W. E. LEWIS.

And now Dec. 2, 1911, comes G. T. Kincaid, Attorney for defendant in the above entitled case and moves the Court for 20 days additional time in which to file exceptions for a new trial in the above action for the reason that the notes of the stenographer have not as yet been written out and filed of record in said case.

G. T. KINCAID,  
*Att'y for D'ft.*

And now Dec. 2, 1911, motion granted and 20 days' additional time allowed defendant to file exceptions for a new trial allowed.

BY THE COURT.  
W.

Endorsement: No. 32 Sept. Term, 1911—Commonwealth vs. A. B. Crowl—Motion for 30 days' additional time in which to file reasons for new trial. Kincaid.

27 In the Court of Quarter Sessions of Erie County, Pa.

No. —, — Term, 1912.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

*Reasons for a New Trial.*

The court is respectfully requested to grant a new trial in the above entitled case for the following reasons:

1. Because the verdict is against the evidence.
2. Because the verdict is against the weight of evidence.
3. Because incompetent evidence was admitted.
4. Because competent evidence offered by defendant was excluded.
5. Because the court refused to charge "that if the jury find from the evidence that the guilt or innocence of the defendants depends upon the accuracy or completeness of a chemical analysis of the substance sold, that they should be satisfied beyond any reasonable doubt that said analysis was accurate and complete before convicting the defendants."
6. Because the court refused to charge "that the Act of the Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Sec. 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same."
7. Because the court refused to charge "That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same."
8. Because the court refused to charge "that unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted."
9. Because the court refused to charge "that the evidence offered on the part of the Commonwealth is not sufficient to warrant the jury in finding W. F. Lewis, one of the defendants, guilty."
10. Because the court refused to charge "that under the law and the evidence the verdict of the jury must be not guilty."
11. Because the charge of the court was highly prejudicial to the defendant.

WALTER JEFFREYS CARLIN,  
GERRY T. KINCAID,

*Attorneys for Defendant.*

January 23, 1912.

Endorsement: No. 32 Sept. 1911—Comth. vs. A. B. Crowl & W. F. Lewis—Reasons for New Trial—Filed in Clerk of Court's Office Erie Co. Pa. Jan. 25 1912.



29 In the Court of Quarter Sessions of the Peace for the County of Erie, Pennsylvania.

No. 32, September Sessions, 1911.

COMMONWEALTH

VS.

A. B. CROWL.

*Rule for a New Trial and in Arrest of Judgment.*

Defendant was indicted and convicted for selling ice-cream deficient in butter fat, under the Act of March 24, 1909, P. L. 63; Sections 4 and 6 of said Act being as follows:

Section 4. "No ice-cream shall be sold within the State containing less than eight (8) per centum butter-fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter-fat."

Section 6. "Any person, firm, or corporate body who shall violate any of the provision- of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five (25) dollars, nor more than fifty (50) dollars."

It is earnestly urged for defendant that said Act was repealed by the later Act of May 13, 1909, P. L. 520. "Relating to food, etc.,"

But there is nothing in the later Act fixing a standard of butter-fat for ice-cream or that in any manner conflicts with or supercedes the above quoted 4th section of the earlier Act. It is not necessary here to decide whether or not some of the other provisions of the earlier Act are abrogated by the later. We are clearly satisfied that so far as relate to the provisions involved in this case there was no repeal.

30 Implied repeal is not favored; and in our opinion those two statutes are in pari materia, and as far as practicable should be construed together.

The said ice-cream act is in lien with other recent pure food legislation, is intended to protect the public from deception and from imposition, and is in our opinion valid and a proper exercise of the police power of the Commonwealth. It is less drastic than the Oleomargarine Act of May 21, 1885, P. L. 22, and that was sustained both by our Supreme Court and by the Supreme Court of the United States.

Powell vs. Commonwealth, 114 Pa. 265.

Powell vs. Pennsylvania, 127 U. S. 678.

And it is not as drastic as the Act of June 8, 1911, P. L. 712, "Relating to Milk." Within reasonable bounds it is for the legislature and not for the courts to say what per cent of butter-fats ice-cream must contain. It is a well-known article of food, and the manifest meaning of the statute is that when sold it must contain

the per cent of butter-fat stated in the Act. In regulating the sale of food the legislature is not limited to the question of public health. Commonwealth vs. Kevin, 202 Pa. 23. Such legislation is beneficial to the public and should not be construed so strictly as to defeat the plain legislative intent. In the above cited case of Commonwealth vs. Kevin, 202 Pa., on Page 27, the Supreme Court say: "The object of the statute is to protect the public health by securing pure food and to prevent fraud and deception in the manufacture and sale of adulterated articles of food. The purpose of the legislature in the passage of the act is most commendable and the statute should receive a construction by the courts that will fully and effectively accomplish the object of its enactment." See also Stull vs. Reber, 215 Pa. 156; Commonwealth vs. Shoben, 215 Pa. 595; Bechtel's Election Expenses, 29 Superior Court, on page 302.

The fact that the Dairy and Food Commissioner is charged with the enforcement of the Act does not prevent any other citizen from instituting prosecutions thereunder, and in our opinion is not material.

And now, June 24, 1912, the rule for a new trial and also the rule in arrest of judgment in above stated case are discharged.

PER CURIAM.

W.

To which same day the defendant excepts and an exception is sealed.

EMORY A. WALLING, P. J. [L. s.]

Endorsement: No. 32, Sept. Sessions, 1911. In the Court of Quarter Sessions of the Peace for the County of Erie, Pennsylvania. Commonwealth vs. A. B. Crowl. Opinion. Filed in Clerk of Court's Office, Erie Co., Pa., Jun- 24, 1912.

2 In the Court of Quarter Sessions of the County of Erie.

No. 32, Sept. Term, 1911.

COMMONWEALTH

vs.

A. B. CROWELL.

to the Honorable the Judges of the Court of Quarter Sessions of said County:

The petition of A. B. Crowell the defendant above named, respectfully represents:

That at the Court of Quarter Sessions held in and for said County Erie at the Nov. Term, 1911, he was convicted upon an indictment charging defendant with having sold ice cream containing less percent of butter fat than is required by the Act of Assembly March 24, 1909; and on the 24th day of June 1912, his motion

for a new trial and suspension of sentence was denied by your honorable Court, and he was on July 1, 1912, *he was* sentenced to pay a fine of twenty five dollars and costs.

That the Court erred in refusing the application of defendant for a new trial and suspension of sentence.

That your petitioner intends at once to take an appeal to the Superior Court from the judgment and sentence of the said Court of Quarter Sessions. That your petitioner prays your honorable Court to make an order staying said sentence until an appeal can be taken to the Superior Court, and that thereafter said appeal shall be a supersedeas to stay the sentence imposed, until the said appeal can be determined and disposed of, upon such conditions and terms as you- honorable Court may see fit to impose.

A. B. CROWL.

STATE OF PENNSYLVANIA,  
*Erie County, ss:*

A. B. Crowl being duly sworn according to law deposes and says: That the facts set forth in the foregoing petition are true and correct.

A. B. CROWL.

Sworn and subscribed before me July 1, 1912.

[SEAL.]

GERRY T. KINCAID,  
*Notary Public.*

My Commission Expires Jan. 30, 1915.

33 And now July 1, 1912, it is ordered that the sentence in the within case be stayed until an appeal can be taken by the said defendant, and thereafter said appeal to be a supersedeas to stay the sentence imposed, until the said appeal can be determined and disposed of. Bond required in \$200.00.

PER CURIAM.

Endorsement: No. —. Term, 1911. Commonwealth vs. A. B. Crowl. Petition for supersedeas. W. J. Carlin. Kincaid & Kincaid, Attorneys at Law, Corry, Pa. Filed in Clerk of Court's Office, Erie Co., Pa., Jul- 7, 1912.

34 *Commonwealth's Witnesses.*

G. M. Pelton.....	6
James A. Evans.....	14-125
F. T. Ashman.....	45

*Defendants' Witnesses.*

Dr. Joseph A. Deghucc.....	60
Albert W. Smith.....	109
Charge to the jury.....	134

*Exhibits.*

Jar. page 13. (Exhibit A).

Babcock bottle. Page 127. (Offer refused).

35 In the Court of Quarter Sessions of Erie County, Pa.

No. 32, September Sessions, 1911.

COMMONWEALTH

vs.

A. B. CROWL and W. F. LEWIS.

Tried before Hon. Emory A. Walling, and a Jury, at Erie, November 15, 1911.

Messrs. J. B. Brooks and M. L. Davis appearing for the Commonwealth.

Messrs. G. T. Kincaid and W. J. Carlin appearing for the Defendants.

And now, November 15, 1911, the above named defendants by Walter Jeffreys Carlin and Gerry Kincaid, their attorneys; demur to the indictment in the above stated case, and say that the indictment is not sufficient in law to maintain a charge upon which the defendants could be convicted and, in support of this demurrer, assign the following reasons:

1. That the indictment does not charge a crime.
- 36 2. That no Act of the General Assembly makes it — crime to sell ice cream containing less than eight per cent. of butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.
3. That the indictment does not contain a specific description of the offense and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in bar to another indictment for the same offense.
4. That the food acts of March 24, 1909, and May 13, 1909, both commit to the Dairy & Food Commissioner the sole power to commence prosecution for its violation and is therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.
5. That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioner as required by the act, but, on the contrary, shows that it was not commenced by said official.
6. So much of the complaint and indictment as sets forth  
37 any charge other than actual sale of ice cream should be quashed and dismissed for the reason that the statute does not make it an offense to "manufacture"—"offer for sale"—"expose for sale"—"have in his possession with intent to sell"—ice cream which violates section 4 of the Act of General Assembly of the Commonwealth of Pennsylvania, approved the 24th day of March, 1909. The provisions in section 1 of said act only apply to section 2 thereof, which defines adulterations. Section 4 does not define adulteration, and fixes a standard for which a penalty for the violation thereof is provided by section 6.

7. So much of the information or complaint and indictment as charges that the sale was by an agent, servant or employee should be dismissed for the reason that the statute does not make it an offense to sell ice cream which violates section 4 of the above named act by an agent, servant or employee. These provisions of section 1 only apply to section 2 of said act which defines adulteration. Section 4 does not define an adulteration, it fixes a standard and a penalty is provided in section 6 and that is merely a penalty for a personal sale.

8. That as the statute does not make it an offense to sell  
38 by an agent, servant or employee, ice cream in violation of section 4 of the said act, but in fact whether the statute does or not make such an act an offense, the information or complaint is in a disjunctive form, making the charge indefinite and uncertain and the information fails to charge a crime for the reason that it does not show whether the offense was committed by the defendants or by one of their agents, servants or employees.

9. That the act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the amendments to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.

10. That the act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.

By the Court: Demurrer overruled, to which defendants except and an exception is sealed.

EMORY A. WALLING, P. J. [SEAL.]

(Jury Sworn.)

39 G. M. PELTON, sworn, and examined by Mr. Davis, testified as follows:

Q. Where do you live?

A. Youngsville, Warren County, Pa.

Q. What is your occupation?

A. One of the special agents of the Dairy and Food Department of the State of Pennsylvania.

Q. I wish you would state if you know these defendants, Mr. Crowl and Lewis?

A. I do, yes sir.

Q. When, if at any time, did you visit their place of business, and what if anything did you purchase there?

A. On the 21st day of June, 1911, I was at the place of business of A. B. Crowl and W. F. Lewis, 22 North Center Street, Corry, Erie County, Pa., who conducts a confectionery and ice cream store and there I purchased one pint of chocolate ice cream from A. B. Crowl, one of the defendants. It was placed in a pint jar, I paid him fifteen cents for the same, placed the following label on the pint jar "4372, G. M. P., Crowl & Lewis, Corry, Pa., June 21, 1911, one pint chocolate ice cream, paid 15c, of A. B. Crowl."



Q. What did you do with this jar?

A. I delivered it to Prof. James A. Evans at his laboratory in this city on the same day, about 3.45 in the afternoon.

40 Q. I wish you would look at this jar and state what it is?

A. That is the jar that the ice cream was placed in—the jar I delivered to Prof. Evans, and also my label on the jar as I identified with my own handwriting.

Q. You say that is in your handwriting: the label?

A. Yes sir.

Q. What did you ask for, when you called for ice cream?

A. Chocolate ice cream.

Q. How did they give it to you?

A. Placed in this pint jar.

Q. They put it in the jar themselves?

A. Yes sir.

Q. I wish you would state if you have since had any talk with either of the defendants?

A. I have.

Q. Which one, if either?

A. About the 5th of August I saw Mr. Crowl and he told me—

Objected to, unless Mr. Lewis was present.

By the Court: It is competent evidence against Mr. Crowl.

The witness resuming:

A. Mr. Crowl told me he was one of the proprietors and he was one of the proprietors on the day the sale was made to me.

Mr. Davis, resuming:

41 Q. State if you had a conversation later with Mr. Lewis?

A. Later on about November 11, 1911, I saw Mr. Lewis at his place of business and he also told me that he was in partnership with Mr. Crowl and was at the time I bought the sample, on June 21, 1911.

Cross-examined by Mr. Carlin:

Q. Did you purchase any other products on June 21st?

A. Yes, sir.

Q. What did you do with this product that you put in this jar when you left the store?

A. I took it to the hotel and put it in my basket that I carried my samples in.

Q. Were there any other samples of ice cream in that basket?

A. There were.

Q. And you say you took this to Prof. Evans?

A. Prof. James A. Evans.

Q. What is he professor of?

Objected to by Commonwealth.

By the Court: He will be called as a witness; you can ask him.

Q. What did you purchase in this store?

A. Chocolate ice cream.

Q. Was it chocolate ice cream?

A. That is what I asked for.

42 Q. That is what you bought it for?

A. And it looked like chocolate ice cream.

Q. What does chocolate ice cream look like?

A. It looks like chocolate.

Q. What does chocolate look like?

A. I couldn't tell; I am not a chemist.

Q. Did you analyze this?

Objected to, for the reason that there is no testimony of his analyzing it and as not being cross-examination.

By Mr. Carlin: He states he knows what it is; I am entitled to find out how he knows it.

The Court: You can ask him the question.

Q. How do you know this was chocolate, outside of the fact that you asked for chocolate ice cream?

Counsel for the Commonwealth objects to the statement of the gentleman that the witness testified that he knew what it was. He said he did not; he said it looked like chocolate ice cream.

The Court: He said he bought some chocolate ice cream. They can test his knowledge whether it was chocolate ice cream.

43 A. Only in a general knowledge of buying up chocolate ice cream. I bought several samples of chocolate ice cream.

Q. And did you know that any of these samples were chocolate ice cream?

A. Only by the looks of them and what I purchased them for.

Q. And that is all the knowledge you have as to this sample being chocolate ice cream?

A. That is all the knowledge I have.

Q. When you say "they" put it into this receptacle, you mean that Mr. Crowl put it in?

A. I meant Mr. Crowl put it in.

Q. Mr. Lewis wasn't there?

A. Mr. Lewis wasn't present.

Q. You swore to the information in this case, didn't you?

A. I did.

Q. You swore that these men manufactured this ice cream?

Objected to.

The Court: The information is the better evidence if it is important.

Q. You swore to the second information, didn't you?

Objected to.

The Court: The information should be produced and handed to the witness, if it is competent in the case.

44 Q. The first conversation you had with Mr. Lewis was on November 11th?

A. I think it was.

Q. That was some time after you swore to the information against him, wasn't it?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Then at the time you swore to this information against Mr. Lewis you had no statement from him whatever as to whether he was a partner or not?

A. Not from him directly.

Q. Why did you go to see Mr. Lewis on November 11th?

A. I went to see if he was one of the owners; partner with Crowl Lewis.

Q. After you had sworn that he was?

A. Yes, sir.

Q. So that you swore that he was first, and then went to see him afterwards to verify it: is that right?

Objected to.

The Court: I don't think that is important.

Q. Do you know of your own knowledge how much butter fat is ice cream contained?

Objected to as not cross-examination.

The Court: They hadn't asked him anything about that.

Q. What time did you make this purchase from Mr. Crowl?

A. Some time after dinner, between one and two o'clock.

Q. And what did you do with it; took it to the hotel?

A. Placed it in my grip and took the train. Took it to the hotel and placed it in my basket and left Corry on the train that leaves are about 2:30 p. m., arriving in Erie at 3:45, about.

Q. Then what did you do?

A. Delivered it to the chemist, Prof. Evans, at his laboratory.

Q. And what time was that?

A. About 3:45 or 4 o'clock in the afternoon.

Q. You receive a salary from the State department?

Objected to.

Objection overruled.

A. I do.

Q. Are you paid by the year?

A. By the month.

Q. By the month?

A. Yes, sir.

Q. A stated salary per month?

A. Yes, sir.

Q. Did you see the can from which this product was taken?

A. I did not.

Q. Was this product in a brick form or in a loose form?

A. Loose form.

Q. Do you know whether the can from which it was taken was filled to the top or not; could you see that?

A. I did not.

Q. What condition was it in when it was placed in this jar?

A. Hard condition. Good and solid.

Q. Did you ice it?

A. I did not; I didn't need to.

By Mr. Davis:

Q. When did I understand you placed that label on the can?

A. At the time I purchased it.

Q. Where?

A. In the store of Crowl & Lewis.

The jar produced by the witness is marked Exhibit "A" for identification.

47 JAMES A. EVANS, sworn, and examined by Mr. Davis, testified as follows:

Q. Where do you reside?

A. In Erie, Pa.

Q. What is your business?

A. I am a chemist.

Q. I wish you would state from what college you graduated and what department thereof?

A. I graduated from the University of Michigan in June, 1900 from their regular course in chemistry; four year course.

Q. I wish you would state what you have been doing since that time?

A. I have been constantly engaged in analytical chemistry since that time. For the three years succeeding graduation I was at Cleveland, Ohio at the Western Reserve Medical College and connected with the Ohio Dairy Food Commission, analyzing samples of food, and then I had a sugar factory for one season, analyzing sugar products, and then came to Erie in the first months of 1904 and have been here ever since, and since the latter months of the same year, 1904, have been doing work continuously for the Pennsylvania Dairy and Food Commission of the Department of Agriculture of Pennsylvania.

48 Q. I wish you would state what experience you have had in the analysis of food products and samples?

A. I have been analyzing food samples practically for the last 11½ years; various kinds of food products that have been submitted to me.

Q. During that time what experience have you had in analyzing ice cream samples?

A. Among the samples of food that have been submitted have been samples of ice cream—quite a large number—that I have analyzed.

Q. I wish you would look at this jar and state what it is?

Exhibit "A" shown witness.

A. That is a jar that I brought here this afternoon which I re

ceived on the 21st of June, 1911, from G. M. Pelton. I received it at my laboratory in this city. It bears the record "4372, G. M. P., Crowl & Lewis, Corry, Pa., June 21, 1911, one pt. chocolate ice cream," etc.

Q. What did the jar contain at that time?

A. It contained ice cream.

Q. What did you do with the contents of that jar?

A. I analyzed it.

Q. When?

A. The same afternoon.

Q. I wish you would state to the Court and jury what you did, in the analysis of this sample?

19 A. Detail the analysis I went through?

Q. Yes.

A. I first got it in an entirely melted condition and then emptied the entire contents of the can and mixed it thoroughly by dipping it forward and back between this receptacle and another until it was thoroughly and intimately mixed, homogenous throughout. Then I drew out samples into Babcock milk bottles, having weighed the bottle, and in weighing again got the weight of the amount taken, and proceeded to follow out the Babcock method for analysis with the modification as outlined by Dr. Julius Hortvet. I might say that the only difference there is in the method as I carried it out and the regular official method for the analysis of milk and cream, etc., is that ice cream has sugar added to it to sweeten it and running ice cream through by the regular official method the strong sulphuric acid chars the sugar which is there and blackens it and obscures the final reading—does not make it very exact, and the Hortvet modification is to eliminate as much as possible of that sugar before starting in on the regular official method, and that I did by adding a weak solution of sulphuric acid and separating by centrifugal force and syphoning off this weak acid which dissolves the sugar thereby eliminating the sugar, and then proceeding to the regular Babcock method and making the final readings in the regular way. I think that outlines the method.

Q. Now what was the result of your analysis?

Objected to for the reason that there has been no proper basis for the question, and for the further reason that it is not proper evidence; that the ice cream could and should be produced here.

Objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

A. I found it to contain less than eight per cent of butter fat.

Counsel for defendant moves to strike out the answer as not responsive to the question.

(Last question repeated).

A. I found it to contain less than eight per cent. of butter fat.

Motion withdrawn by counsel for defendant.



Q. Just how much butter fat did you find in the sample; what percentage?

Counsel for defendant objects as before, objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

51 A. I found it to contain 2.7 butter fat or fats in total.  
Q. What condition was this ice cream in when you received it.

A. It was in a cold condition. It was melted around the jar but as I remember it it had a core in the middle which was still frozen.

Q. Where has that jar been since that time?

A. It has been in my locker in my laboratory.

Q. It has been in your possession since that time?

A. Yes, sir.

Q. Is that locker fastened in any way.

A. It is locked with a key which I carry in my pocket.

Q. What kind of ice cream did you find this to be?

A. It was chocolate ice cream, containing no fruit or nuts.

Q. What was the flavor of the ice cream?

A. Chocolate flavor.

Cross-examined by Mr. Carlin:

Q. What is ice cream, Mr. Evans?

A. Ice cream varies under different formulas—different recipes. It is not always the same. I take it to be, as ordinarily understood, a frozen milk or cream product, sweetened with sugar and flavored with some flavoring material.

Q. Does ice cream ever contain gelatin?

52 A. Yes, sir.

Q. Does it ever contain gum tragacanth?

A. Yes, sir, I think so.

Q. Is it ever made with condensed milk?

A. It may be that it contains at times condensed milk. I am not so ready to say that I think that would be really ice cream though.

Q. Why wouldn't it be ice cream?

A. It may be; but ice cream as I understand it, and as I think the common people understand ice cream, they expect to get fresh milk or cream frozen.

Q. What basis have you for your understanding of what the common people understand?

A. Just my general knowledge, and also the recipes and formulas which I looked over in books which give those formulas.

Q. Have you studied the formulas of ice cream in cook books?

A. I have looked through some.

Q. How far back?

A. I haven't made an extensive study of the formulas in cook books. I don't know how far back they do go, but I have seen formulas in cook books.

Q. Does ice cream ever contain corn starch?

A. Yes, probably it does.

Q. Does it ever contain arrow root?

A. Arrow root starch do you mean?

53 Q. Would this be ice cream; one pint of milk, a scant cup full of flour, one quart of cream, one cup full of sugar, two eggs and a table spoon full of flavoring extract; would that mixture, properly mixed and frozen, be ice cream?

A. I don't know as I caught all those ingredients, and I don't know as it might be ice cream. Whether it would be ice cream under the definition of eight per cent. butter fat I couldn't tell you without figuring it out.

Q. In other words, you would determine as to whether or not a product was ice cream by the per centage of butter fat that it contained?

A. I wouldn't say but that I might pass on a frozen milk product and eat it for ice cream and it contained less than eight per cent butter fat.

Q. You would call it ice cream?

A. If it was given me for ice cream I might eat it and think it was rather a poor grade—rather a thin grade of ice cream.

Q. You would think that something containing less than 8 per cent. would be a poor grade?

A. I said I might think so.

Q. Suppose that contained eggs; would it make a poor grade? The per centage might be less than eight and yet be a very rich cream, if it contained sufficient eggs.

54 Counsel for Commonwealth — to this line of examination.  
The Court: I don't see how this line is competent at this time.

Q. Did this product contain eggs?

A. I don't know.

Q. Did it contain gum tragacanth?

A. I don't know; I didn't try to find out.

Q. Did it contain any condensed milk?

A. I didn't try to find out.

Q. Was there any flour in it?

A. I don't know.

Q. So when you say this jar contained ice cream you merely say this was a product which if handed to you, you would say was ice cream?

A. Yes, sir.

Q. Now did you use the Hortvet method?

A. I used the Hortvet modification of the official Babcock method.

Q. And is that reported any place? Is it cited as an authority by any one?

A. I might say that there is no official method for ice cream analysis. There are several methods which can be used and this

55 one is in print in the bulletin of the State of Minnesota. Dr. Hortvet is the chief chemist of that state and he has worked out this method, which works well and corresponds with other methods, and I might have used some other method I presume but it would have been no more official than this one. We had to use some method.

Q. This method which Dr. Hortvet has reported in his own state bulletin, did you follow that method strictly?

A. I think so. I had all the official details.

Q. And what would you call the unofficial details?

A. The only difference that I recollect just now, I think I am clear on it, is the method of withdrawing the clear under liquor, and that is, I take it, optional so long as you don't remove any of the fat, by changing it slightly. I did it a little quicker way, that is all.

Q. Then in following the Hortvet method you modified it yourself again?

A. No, I didn't modify it in any special particular. The Hortvet modification of the official method is this: In order to remove the sugars you make a weak solution of sulphuric acid, a one to two solution—one part sulphuric acid and two of water and cool this down to 50 degrees Centigrade and then add it and mix it and whirl it and separate the fats to the top by centrifugal force. The Hortvet modification at that point says: syphoning off the underlying

56 strata of clear acid containing the sugar, and the only difference was in my modification I took a pipett- and filling the point of it with water and holding my finger firmly over the top of it inserted it through the thin strata of fats down to the bottom of the Babcock bottle and then drew out this under liquor and you could fairly say that no fat got into the pipett- and then withdrew the pipett-, washing off the outside of it so there was no fat abstracted from the bottle. I withdrew the underlying liquor in that way, instead of just exactly the detail as he says of syphoning it off. One is equally good with the other.

Q. In your opinion?

A. Yes, sir.

Q. But that is a modification of the Hortvet method?

A. It is a modification of just the shape of the glass you use. It is not a modification of the method at all.

Q. This liquid you drew off, was that clear?

A. Yes, sir.

Q. You are positive of that; this underlying liquid you drew off was clear?

A. Yes, sir, it was quite clear.

Q. When you described this method that is the way you handled this particular sample?

A. Yes, sir.

Q. When you speak of official methods, you mean official for what?

57 A. I refer to the Babcock method as the official method. It is the official method of the U. S. Government, the A. O. A. C.,

the Association of Official Agricultural Chemists, and it is laid down in their latest bulletin on official methods and with the exception of this preliminary step of getting rid of the liquors I followed the official method as designated by the official chemist.

Q. For what do they designate that: for ice cream?

A. No.

Q. For milk, isn't it?

A. For milk or cream.

Q. But not for ice cream?

A. No; I didn't state so.

Q. How many samples did you test: just this one test? Did you make any check determination?

A. Yes, sir, I made a check determination.

Q. One or two?

A. One other.

Q. What other methods have you compared this method with?

A. I have compared it with two other methods, neither of which are official, and I know of no official method for ice cream except the official method for milk and cream and its modification.

Q. What are the two you compared it with?

58 A. The one which I know as the Acetic Acid Hydrochloric Method.

Q. And that method, to be brief, is another centrifugal method used exactly the same as the Hortvet method except in the character of the acid which you use, is that true?

A. It is not exactly the same as that.

Q. But the principle is the same?

A. It involves the centrifugal principle. It is a method by which you use equal parts of acetic acid and hydrochloric acid and dissolve and warm up until the sugar and casein is dissolved in this acid and then by centrifugal force separate the fats into the top.

Q. That is generally known as the Chicago Board of Health method?

A. It may be.

Q. What other method did you compare it with?

A. I compared it with this method that I just outlined twice, on two different samples.

Q. But not on this particular sample in question?

A. No, not on this sample; it was two other samples. They may both have been vanilla ice cream.

Q. None of them were chocolate ice cream, were they?

A. I think not; but one of them contained gelatine. And they agreed exactly; I got the same results by both methods. Then I tried the same sample which contained gelatine and which

9 I tried these two samples on. I tried a third method on that same sample.

Q. What is the third method?

A. Designated as the Roesse Gottlieb method. It is not an official method.

Q. When did you do that: make this examination by the Gottlieb method?

A. I did it a couple of weeks ago.

Q. About two weeks ago?

A. Yes sir.

Q. Did you do that with the chocolate ice cream?

A. No.

Q. Would it make any difference whether it was chocolate or vanilla?

A. I don't think it would.

Q. Your opinion it would not?

A. Yes sir.

Q. What is chocolate?

A. Chocolate is the roasted and ground cacao bean.

Q. What is it: is it a vegetable or fruit or berry or what?

A. It is a bean. It is the seed of the cacao tree which grows in the tropics. It is one of the theobromine class I guess. I am not very much of a botanist. It grows in a pod and these seeds are taken out and roasted to develop the aroma and then they are ground.

60 Q. Was this particular product chocolate ice cream?

A. It had a chocolate flavor.

Q. How do you know that?

A. I tasted it.

Q. Could that flavor have been given to the ice cream by anything but this bean that you speak of?

A. I hardly think so.

Q. Would you say it can not?

A. I don't know of anything else that would give it a good chocolate flavor.

Q. When did you taste this?

A. The afternoon that I analyzed it.

Q. Will crude fiber dissolve in acid?

A. What kind of crude fiber?

Q. From a chocolate bean?

A. No, I don't know as it will.

Q. Does chocolate contain crude fiber?

A. I presume it contains a small per centage of crude fiber, yes.

Q. What per centage?

A. I couldn't give you the exact per centage. The chocolate bean contains about one half, as I recollect it; I don't know the exact figures, of fats, and then the other half would be of the other constituents.

Q. This crude fiber that comes from the chocolate bean will it dissolve in acid?

61 A. I don't know as it will dissolve completely in acid, but still—

Q. Will it dissolve in the one and two solution of sulphuric acid?

A. No, I shouldn't think so.

Q. Will it dissolve in straight sulphuric acid, such as you used in making this test?

A. It goes up practically. It is finely divided before it goes in.



very finely divided, and it is rather a heavy substance. If it does not dissolve it would go to the bottom of the bottle.

Q. In this final determination what was the color of your liquid that you found? There was a liquid left in the bottom of your bottle?

A. That I withdrew?

Q. Yes.

A. Yes, I stated so.

Q. What color was that?

A. Of a brownish color.

Q. Dark brown?

A. No, a light amber brown.

Q. Will the fiber go to the top or stay at the bottom of this liquid?

A. Which liquid?

62 Q. The liquid that you have left as the final result?

A. The first liquid will come to the top. The second liquid will go to the bottom.

Q. So that — the final conclusion of your test your fiber will be on the bottom, is that right?

A. I didn't see very much fiber there. In the first place there isn't very much; it doesn't take a great quantity in per centage of that chocolate to flavor an ice cream and in the second place it is very finely ground when it goes in. And in the second instance it may be distributed through the liquor. I wouldn't say. The second instance the liquor is very dark, it is not transparent. You cannot see just what is there. The strong sulphuric acid darkens it. There was no trouble in reading the fat which was on top. It wasn't in that.

Q. There was no fiber in your column?

A. No, there was not; in the fat column.

Q. You said you analyzed this product. What do you mean by that?

A. I mean I carried out the manipulation which I just outlined.

Q. Do you call that an analysis?

A. That is an analysis; that is a quantitative analysis to determine the quality of butter fat.

Q. Are the gelatine gums, if there were any in this product precipitated by this acid, the sulphuric acid?

63 A. The first one or second one?

Q. First.

A. I think so.

Q. What becomes of it?

A. They are either drawn out when the first underlying liquor is drawn off in solution, or else they are dissolved finally in the strong acid which is applied secondly.

Q. Do they carry fat with them when they are drawn off?

A. I judge not, from the fact that I tried an ice cream that contained gelatine and by three different methods and got the same result in all three.

Q. All centrifugal methods?

A. No sir.

Q. What about the Reese Gotlieb method?

A. That is not a centrifugal method.

Q. But what about it?

A. I got practically the same result with it that I did with the other two methods on a sample of gelatine ice cream.

Q. What do you do in the Reese Gotlieb method to get rid of the gelatine in ice cream: anything?

A. No, you don't.

Q. Did you do anything else with this product beside make this test as to the butter fat?

A. I made analysis to determine the presence or absence of  
64 preservatives.

Q. Anything else?

A. I think not, except as I already stated I tasted it and noted its appearance.

Q. That is, you tasted it and looked at it, but outside of that in this test for preservatives and test for butter fat did you make any test whatever?

A. Well, to detect the presence of fruits or nuts. I tasted it carefully and tasted no fruit, which you can do in a fruit ice cream or nut ice cream. And beside that, you can see the fruit and the nuts usually in the cream itself when it is melted. They settle to the bottom, and also in the Babcock bottle after the acid has been added and the spinning has been done.

Q. When was your attention first directed to this question of the fruit and nuts in this ice cream: when did you make that test: the same day?

A. The same time I made all of them.

Q. What experience have you had in testing fruit by its taste for the presence of fruit or nuts?

A. What experience have I had in testing ice cream? I tested quite a number of samples where I knew the fruit was there and where I could see it.

Q. Do you mean to say when the nuts were ground up and in that ice cream you could see them when it was flavored  
65 with chocolate.

A. I made the other additional statement with the clear acid you would be able to see any particles of nuts there if they were there ground by any machine.

Q. What clear acid: your first test or second?

A. Both of them; I didn't see any in either.

Q. Wasn't your second one a brown liquid?

A. That is true, it is in the bottom of the bottle, but at the time after the second addition of water it is quite clear.

Q. Yet in this one that you are able to say there were no nuts you say you couldn't see whether there was any fiber floating in or not?

A. I didn't quite catch that.

Q. I understood you to say in this second reading whether there was any fiber floating or not because it was of a dark brown color.

and yet you now say you could have seen if there had been ground nuts floating in it?

A. In the case of the nut ice cream you can feel the nuts between your teeth when they are in there.

Q. Will you answer my question. Do you mean to now say that though you could not see fiber floating in this brown liquid that you could have seen ground nuts?

A. If you could see one in the same liquid I was referring to then you could see the other, or at least you could see nuts if you couldn't see the fiber.

36 Q. You could see ground nuts but couldn't see the fiber.

A. I think so, but in the bottom of the main part of the bottle the liquid is quite dark and fiber is a minutely divided substance, would be if it were not dissolved altogether. I didn't say there was any fiber there or wasn't there; I didn't see any, and it may have been dissolved in this strong acid and not there at all. At most it would be there in suspension, in a very fine state of subdivision, much finer than the ordinary grinding of nuts would make nuts, but after the second addition of water and the thing is filled up into the neck the top portion is quite clear and you can see through it and there were no nuts in that portion of it at least.

Q. Were there any nuts in the other portion of it?

A. I don't think there were.

Q. Would you say the acid would dissolve the fiber?

A. Well it is pretty close to that because it is so finely divided. I wouldn't want to say it was absolutely in solution. The proper thing to dissolve fiber is strong alkalis.

Q. Have you ever tried that to see whether it did or not?

A. What?

Q. Whether that sulphuric acid would dissolve fiber?

A. I know the thing to dissolve fiber is caustic alkalis.

37 Q. Would the sulphuric acid dissolve it in your opinion?

A. I don't know that it would, but it amounts to about the same thing as far as the eye is concerned because it is so finely divided.

Q. Are you positive chocolate will dissolve?

A. Yes sir.

Q. Positive?

A. Yes, sir.

Q. Now if this acid would dissolve fiber why wouldn't it dissolve the nuts?

A. I didn't say that it did dissolve it, but I say there is this difference, that the fiber is so finely divided that it is quite different to the eye than ground nuts and in the mouth you can feel the ground nuts, even if they are ground. A sandy feeling.

Q. How do you determine crude fiber in food products?

A. I don't know as I can give you off hand all the details.

Q. Just the general principle of how it is done?

A. I guess I stated that I thought the alkali was the thing to dissolve it. In the determination of crude fiber you eliminate all the other substance and weigh back the fiber. You wash them

thoroughly with strong acid and then wash them with strong alkali and then weigh back the crude fiber. The crude alkali does not dissolve it; you use it for a wash instead of for a dissolvent.

68 Q. If you weigh what is left then the fiber does not dissolve?

A. That is what I said.

Q. So that does not dissolve fiber?

A. No, that is what I say.

Q. It dissolves everything but the fiber?

A. Yes sir; you use that for a wash.

Q. How is fiber finely divided? You spoke about it being finely divided?

A. In the first place it is mixed entirely through a vegetable substance usually.

Q. Isn't it ground; isn't the chocolate ground?

A. Yes sir, and it is ground up with it.

Q. And the nuts are ground with it?

A. Yes sir, but not so fine as the chocolate.

Q. How fine are nuts ground?

A. I suppose that varies.

Q. Doesn't it vary with different manufacturers?

A. I presume.

Q. And the amount of nuts used would vary?

A. I suppose so.

Q. Isn't it a fact that many ice creams are made with flavors and also with nuts?

A. I suppose that is possible.

69 Q. What were the temperature of these Babcock bottles when you finished your test?

A. I didn't determine the temperature exactly.

Q. Can you state how much it was?

A. I determined the temperature of some run in the same way recently.

Q. I am asking about this particular sample: did you determine in this test?

A. No, not exactly. I determined it with my hand. I run it according to the directions.

Q. In answer to the question before the magistrate: "What was the temperature at the close of this test," didn't you say it was about 85?

A. No, I don't think I did. I don't know whether I said it in this case or not, but I have said it in regard to this method, that it was approximately 80, as determined simply by the grasp of the hand, but I have since made some actual determinations of the temperature, running it as I always do in my customary way and I find the ones that I determined ran from about 150 to 160.

Q. That is the recent ones that you ran?

A. Yes sir.

Q. Not this one?

A. No sir.

Q. Didn't you say in answer to this question: What was the temperature at the close of the test"?, your answer, about 85?

A. No, about 80.

Q. You are positive you didn't say 85?

A. Yes sir.

Q. What test did you make as to the temperature?

A. I didn't make any except the test of the hand and I said 80. I know why I said 80, because I am somewhat familiar with the temperature 80. We use that temperature quite a bit in the laboratory and I judge it was about that temperature. I don't say it was exactly that temperature.

Q. Would the temperature make any difference.

A. The temperature within certain limits doesn't make any appreciable difference that you can notice with the naked eye.

Q. When you speak of 80 you are speaking of Centigrade.

A. Yes sir. But of course as temperature runs up any substance expands. Water will be more. Fats will expand still more, so at a higher temperature the fats would reach a larger volume and larger per centage than at a lower temperature.

Q. Did you give these bottles a hot water bath when you finished your test?

A. No.

Q. What method does the government use in testing ice cream?

A. I don't know. They have no official method.

Q. Does it make any difference what part of a can a sample of ice cream is taken from?

A. If it has not been melted it does not.

Q. Assuming just an ordinary can of ice cream standing in a confectionery store, would it make any difference as to what part the sample sold was taken from?

A. As I say, if it has not been melted the ice cream is mixed all the time that it is being frozen, in order to keep it smooth and not granular and that keep the milk and cream intimately mixed while it is being frozen and the final product is quite uniform throughout.

Q. Quite uniform?

A. Yes sir.

Q. How do you know that?

A. It would have to be.

Q. Well, how do you know it?

A. I know it being tried for one reason and taken from different parts of the can at different stratas and they analyzed that.

Q. You did that?

A. No, I didn't.

Q. You have read that other people did?

A. I know of a man who did it, yes sir.

Q. Did you ever read of the experiments made in that direction by Dr. William A. Wyman of Covington, Ky.?

A. No.

Q. He said in that that his first sample—

Objected to.

The Court: As to anything that throws light upon his analysis



you have a right to examine, but not anything that is competent as a matter of defense. You cannot open your case by cross-examination of a witness. I do not think you can read out of a book or pamphlet in the cross-examination of a witness.

Q. Would you say that it would be possible from the same can, taking a sample at the edge, another at the center and another at the lowest strata, to get three different samples that would vary as much as seven or eight points, if it was a five gallon can?

Objected to as not cross-examination.

The Court: I don't believe that is cross-examination. It may be competent in rebuttal to show that, but I do not think it is cross-examination.

Objection sustained and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Isn't it a fact that the more recent authorities have abandoned centrifugal methods for testing ice cream?

A. I don't know that there has ever been an official method for testing ice cream.

73 Q. More recent. Haven't they abandoned centrifugal as being unsatisfactory?

A. It is pretty difficult to find any authorities with any methods for testing ice cream at any stage of the game.

Q. There are other methods beside those you have described?

A. I don't know that I know of any other that is laid down specifically for testing ice cream.

Q. Leach is an authority on food work?

A. Yes sir, I think so.

Q. His recent work abandons and states as one of the main changes made—

The Court: I don't believe you can cross-examine him about the contents of a book. If Leach so states and it is competent evidence you can offer Leach when the proper time comes, but I don't think you can cross-examine Mr. Evans about what Leach says.

Exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Did any authority ever recommend a centrifugal method for chocolate ice cream?

A. I don't know. It is pretty hard to find any authority that recommends any method for any kind of ice cream. They have been pretty slow on doing it. We have had to get the methods and work them out ourselves pretty much.

74 Q. In fact it is recognized rather a difficult matter to test ice cream?

A. Well, I have worked on three methods and got them all to agree on the same sample. I think that ought to be pretty safe.

Q. But not on this sample?

A. More than that, I made the ice cream in the first place and knew how much fat it contained and they corresponded with what I put in it.

Q. And how did you find them: how did you know how much they contained?

A. I measured the quantities I put into it.

Q. Measured?

A. Yes sir.

Q. Didn't weigh?

A. Yes sir, weighed them.

Q. And then worked out your percentage from the weight of the various materials?

A. Yes sir. I don't want to be misunderstood that I did that too exactly. I said they corresponded rather closely with what I put in it. I mean to say this: my scales were not as delicate as they might have been for weighing those original substances, but I made the ice cream and put some gelatine in with it and I made approximately a nine per cent. ice cream, having analyzed the cream

75 I put in it and I got by these methods 8.8 per cent., which is pretty close to what I put in; but even the Roese Gotlieb method, which is not a centrifugal method, did not develop the full nine per cent; in fact, it was a little less than the centrifugal methods.

Q. Did you freeze this product, or did you just make the mixture?

A. I froze it.

Q. In a regular freezer?

A. Yes sir.

Q. Was this a chocolate ice cream?

A. No, it was not.

Q. So you have never made that test you speak of on a chocolate ice cream?

A. No, I did not on a chocolate ice cream.

Q. Are you a regular employe of the State department?

A. I have been doing work for them for the last seven years.

Q. You are paid by the analysis you make?

A. Yes sir.

Q. And how much do you receive for the determination of ice cream?

Objected to.

Objection overruled.

A. I have no objection to telling. I am very willing to say that I get the same amount, whether the case developes into a case or whether it does not. I am very willing to state the exact

76 sum, if you desire me to, as far as I am concerned. I get three dollars a sample, whether it developes into a case or whether it does not.

Q. And are you paid for your attendance at court?

A. Yes sir.

Q. Do you travel around with the inspectors to various places?

A. I go to court when I am subpoenaed to go with the inspectors.

Q. Don't you travel around with the inspectors and set up your laboratory in various towns and make the analysis for them right there after they take the sample?

A. Yes sir, we do that in the summer time—perishable samples of milk and cream, and we have done it somewhat with ice cream.

Q. Who pays your expenses on those trips?

A. I pay them myself.

Q. How long did you take to make that analysis?

A. For the determination of the butter fat?

Q. Yes.

A. It takes about three quarters of an hour to go through it once, and then I went through it again.

Redirect by Mr. Davis:

Q. I wish you would state what you mean by "quantative analysis?"

77 A. Analysis are divided into two classes; qualitative analysis and quantitative analysis. A determination to determine the quantity of any given ingredient in any substance is known as a quantitative analysis for that purpose.

Q. In this particular case what was your analysis for?

A. In the case of the fat it was to determine the quantity of fat. In the case of the preservatives it was a qualitative analysis.

Q. And what qualitative analysis did you make?

A. Just as I stated: in the case of the preservatives those were qualitative analysis.

Q. Is that a complete analysis of the sample of all its ingredients?

A. It is not a complete analysis of the material in all its constituent parts, but it is a complete analysis to determine the quantity of that one constituent.

Q. And in this case your analysis was sufficient to determine what?

Objected to.

The Court: I think an expert may testify whether he made a complete analysis.

A. I made a complete analysis to determine the quantity of butter fat. I didn't make a complete analysis to determine the quantity of all the ingredients in the sample.

Q. What evidence of fruit or nuts did you find in this sample?

A. I didn't find any.

78 F. T. ASHMAN, sworn, and examined by Mr. Davis, testified as follows:

Q. Where do you reside?

A. I live in Beaver, Pa., having my office and laboratory in Pittsburg.

Q. With what college are you connected?

A. I am Professor of chemistry at the University of Pittsburg.

Q. How long have you occupied that position?

A. Twenty years or more.

Q. How long have you been an analytical chemist?

A. I graduated at Columbia University from a four year course

in the year 1881; that is a little over thirty years ago, and I practiced my profession since that time.

Q. During that time what experience have you had in the analyzing of food samples?

A. It has been quite large. I might say that for twenty years or more I have been chemist for the department of agriculture in this state in connection with the dairy and food department, and for one year too I was chemist to the department of agriculture of the United States, doing similar work for the United States, until they established their own laboratory in Pittsburg.

Q. What experience have you had in the analyzing of ice cream samples?

79 A. It has been quite varied. I have analyzed numbers of ice cream — that have been brought in to me for examination and some home made ice creams.

Q. What experience have you had in the analyzing of cream and milk samples?

A. That has been very extensive. I have analyzed thousands of samples of milk and cream.

Q. I wish you would state if you heard the testimony of Mr. Evans?

A. Yes sir.

Q. You heard the testimony of his analysis of the sample in this case?

A. Yes sir.

Q. I wish you would state whether or not the method that he explained as having used in this case is an approved method?

A. I would say it was a proper method. One of the recognized methods.

Q. I wish you would state if you have used that method yourself?

A. I have tried the method out and found it all right. I have tried it in connection with other methods and in an experimental way with what I call a positive method. If you like I will explain.

Q. Yes.

80 A. In order to test up the different Babcock methods I made an experiment recently. I took some commercial ice cream. It was three different kinds; what we call ice cream brick, both vanilla, chocolate and strawberry and tested part of it with two Babcock methods and also a part of it by using a modification of the cheese method, that is whereby we determine the fatty cheese; mixed it with dry copper sulphate and then extracted them with ether. I found that they agreed quite closely. In fact what I would call the positive method gave me a somewhat lower result than the Babcock method did. The Babcock methods went about 7.9, while the other method gave me 7.2 butter fat, so that and from various other experiments I have made and in the long practice I have had I would consider the Babcock method perfectly reliable for the ordinary testing of ice cream.

Q. You heard the description of this sample, did you not?

A. Yes sir.

Q. From the description of the sample and also from the descrip-

tion by Prof. Evans of the method he pursued in analyzing for butter fats, what would be your opinion as to whether or not he could arrive at the proper amount of butter fats in that sample?

81 Objected to for the reason that whether he could or could not arrive at it is of no importance; the question being as to what he did, and he has already testified to what he did; and that the question is irrelevant and incompetent.

The Court, to Mr. Davis: What description have you reference to?

Mr. Davis: The description of the analysis given here in court.

The Court: Basing your testimony upon the description given by Mr. Evans here in court to-day. The objection is overruled, evidence admitted and exception sealed.

EMORY A. WALLING, P. J. [SEAL.]

A. I would say that this was a sample of chocolate ice cream containing the percentage of butter fat that he states, judging from his testimony.

Counsel for defendants moves to strike out the answer, as not responsive to the question.

The Court: I don't think the answer is quite responsive to the question.

(Question repeated.)

A. I would say yes sir. I have said that in the beginning.

By Mr. Davis:

82 Q. From the description he gave in court here of the method he pursued in this analysis, what would be your opinion as to the degree of care that he used?

Objected to.

Question withdrawn.

Q. From the description given by Mr. Evans of his method of arriving at a decision as to whether there were any fruit or nuts contained in this sample, what would be your opinion as to his being able to determine that question?

Objected to.

The Court: I think we will permit you to ask him if he heard the testimony of Mr. Evans; whether the method Mr. Evans used in determining whether or not there was fruit or nuts in the sample was a proper method. I believe it is competent for one expert to testify as to whether or not the method used by another expert is competent.

Mr. Kincaid: Our reason for objecting to this is Mr. Evans stated the way he determined the amount of nuts and fruit in that was from his eyesight and taste. He could not determine whether the method was good or not unless he knew whether his eyesight and taste were good. We object to it; it is not a competent question put to an expert.



83 By Mr. Davis:

Q. You heard the testimony of Mr. Evans on the point of determining whether there were fruit or nuts in the sample?

A. Yes sir.

Q. State whether or not the method pursued by him was a proper method?

A. I would say it was.

Objected to, objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Cross-examined by Mr. Carlin:

Q. I understood you to say this was the recognized method?

A. I said it was one of the recognized methods.

Q. Who is it recognized by?

The Court: What method?

Mr. Carlin: The method used by Mr. Evans.

The Court: In determining the amount of butter fats?

Mr. Carlin: In determining the amount of butter fat.

A. The method that he used is the Hortvet method, which is a modified Babcock method.

4 Q. Who is this method recognized by, beside Mr. Hortvet?

A. Hortvet published his method originally in one of the bulletins, if I remember, issued by the State of Minnesota, and it has been quite largely used by different chemists. I know I have used it and I heard Dr. Freer of State College speak of it as being proper method, and also Lewall of Philadelphia, who are recognized authorities and among the fraternity generally.

Q. The men you have mentioned are all employes of the Pennsylvania State Department, isn't that true?

A. Dr. Freer, well he is also U. S. chemist, and I may say I was talking not long ago to Mr. Albrecht, of the U. S. laboratory in Pittsburg, who recognized the method as one of the recognized methods. He is U. S. chemist there.

Q. This Minnesota bulletin, Mr. Hortvet is the chemist there?

A. He is the chemist for the state.

Q. Beside being published in his own bulletin has it ever been recognized by any other authority on food?

A. I couldn't say whether it has been copied anywhere else or not.

Q. When did you have this conversation with Mr. McKnight?

A. Albrecht his name it. During the past week I was discussing with him the methods for making ice cream analysis.

5 Q. At that time you knew you were coming here as a witness?

A. Yes sir. I was naturally interested. That was the time too made these experiments I spoke of.

Q. How do you account for the fact that an abstraction method gave you a low fat result as compared with the centrifugal method?

A. I couldn't tell you just why. I imagine the fat obtained by

ether is purer. I think all of the methods are not as perfect as the ether method. The ether extracts the fat in a greater purity than any other method.

Q. It is the most exact method?

A. I would say so, as far as my experience goes.

Q. Would you say that looking at a sample and tasting it is a proper method for testing whether there are fruits and nuts in it?

A. I would say it would be a proper method for determining certain qualities of it; not all of the qualities but certain qualities.

Q. Would that determine to your satisfaction as to whether or not there were fruit or nuts in a product, just to look at it and taste it?

A. It would depend upon what kind of fruit it was or what I was looking for. If the samples submitted to me were strawberry ice cream, I would want to possibly get some of the bits of strawberry and examine them under the microscope, but in other cases  
86 by my taste or by matter of smell I would be pretty well satisfied that for instance it would be of a certain kind: say chocolate.

Q. Suppose we take a nut ice cream: can you take a nut ice cream that has also been flavored with a flavor such as chocolate and state by looking at it and tasting it whether it contains nuts or not?

A. I would by tasting it; I think I could taste the flavor of nuts and also in biting into the nut. In chewing the thing I would find whether or not it contained nuts.

Q. What is the specific gravity of butter fat?

A. Which fat?

Q. The fat that you get in this determination of ice cream: the butter fat.

A. I couldn't give you the exact specific gravity. It runs something like 0-decimal 87 and 92 or 93.

Q. What of the chocolate fiber which would be in chocolate ice cream: its specific gravity?

A. It would be somewhat heavier than water, depending somewhat again whether it had been compressed in the making of it or whether it had been pulled apart, etc. Of course the specific gravity would be greater than water. I could not give you the exact specific gravity.

Q. Would not this fiber float on this acid in this determination?

87 A. I think it would possibly largely float when the acid is first put in, but afterwards we fill up with water before we run the fat up into the neck and my experience is that practically all of the fiber remains in the lower part of the bottle. It does not come up into the neck.

Q. That was your experience?

A. That is my experience.

Q. And the fiber does not dissolve in the acid?

A. To some extent; not altogether.

Q. To what extent?

A. You must remember that the fiber of the cocoanut, chocolate

s not a pure fiber, and the portion of it that is starch, that is fat and gummy substances, etc. is dissolved, while the pure fiber itself is well developed—that is, I mean if the nut has been full grown, is not completely dissolved, so that when I say the fiber—you mean of course the substance of the nut—I say it is partially dissolved and partially not.

Q. We are talking about chocolate: will the fiber of this chocolate float on this acid?

Counsel for the Commonwealth ask the purpose of this question: if it is for the purpose of testing the chemical knowledge of the witness it may be competent.

88 The Court: I think it is competent as testing the chemical knowledge of the witness and as bearing upon the probable accuracy of the chemical analysis of Prof. Evans.

A. It would depend quite largely upon the physical condition of that fiber. You take some substance, like feathers, which are really heavier than water, will float in the air, and in the same way I could not answer this question as to whether or not this fiber would float on the acid or go to the bottom of the bottle, unless I saw some of it. It depends largely upon its physical condition. If it were fluffy and torn apart it might float on the acid, but if it were dense it would likely go to the bottom.

Q. Did you examine chocolate ice cream by the Hortvet method?

A. I have.

Q. How did the fiber behave in that case?

A. The fiber as a rule, as I stated a while ago, would remain in the body of the bottle, while possibly a few threads might have mounted into the neck. They are easily separated and by properly whirling and keeping the bottle hot you can keep them separate.

Q. If the bottle was not kept hot they would not separate?

A. It would be at the bottom of the fat column. It is possible the fat column itself, the edge of it might not be just exactly very sharp, but you keep the bottle warm and most of the fiber would still remain. A few threads might possibly mount into the neck.

Q. That would cloud your reading?

A. Not if you are careful; if you turn the bottle around and measure it, as I always do, with a pair of dividers, and carefully; it depends upon the care taken.

Q. If the line is not sharp would dividers help you?

A. It is sharp in some parts of it, or it ought to be. It is always sharp in some parts.

Q. When you say you use the Hortvet method, you use the Hortvet method as used by Mr. Evans, or as laid down by Hortvet: which?

A. The method I use I use it in comparison with others. I will say that I personally use the hydrochloric acid method. I copied the method directly from Mr. Hortvet's and then used Mr. Evans' modification of it, both. I saw Mr. Evans here on another case two

or three months ago and he gave me his method at that time and I tried it out.

Q. Then you would say as a general thing this fiber does float around the top and sometimes comes up into the neck of the bottle?

A. No, I didn't say that. I said some small particles of  
90 the fiber might come to the top, but most of it remains in the bulk of the bottle.

Q. Yes, but on top of the acid?

A. Not all of it.

Q. Some of it?

A. Possibly, as I stated, depending upon its condition.

Q. It does not dissolve, does it?

A. To some extent it will dissolve; that is, the contents. The fiber itself, the actual vegetable fiber, is not dissolved to any great extent.

Q. Does it all dissolve so that you get a clear solution?

A. Yes sir, I think by experience you don't have any trouble in the matter.

(Question repeated.)

A. In the samples I tested; of course I didn't analyze Mr. Evans' samples. Yes.

Q. It did?

A. Yes sir, so that I got a clear solution; so I could read my fat with perfect satisfaction and compare with other methods.

Q. And all the fiber had dissolved from the body of the bottle?

A. Not all had dissolved.

Q. There was some there?

A. There was some in what you might call the body of the bottle.

91 Q. There was some small particles of fiber in the neck of the bottle?

A. Some few occasionally, but not always. Sometimes would not be there.

Q. The balance was in the body of the bottle?

A. Yes sir.

Q. Was it on top of the acid or bottom?

A. Some on top and some bottom.

Q. It wasn't all on the bottom?

A. No sir, nor all on top.

Q. When you speak of the body of the bottle you refer to the larger portion?

A. Yes sir.

Q. Some was in the bottom in the acid?

A. Yes sir.

Q. And some on top?

A. Yes sir.

Q. And some in the neck of the bottle?

A. A few fibers would go up.

Q. Do the fibers carry fat?

A. Not if the operation is properly carried out, no.

Q. You are positive of that?

A. That is my experience.

Q. Did you ever take any of the fiber out and make an extraction from it, to see whether it carried fat or not?

92 A. I couldn't say that I did.

Counsel for Commonwealth offers in evidence the jar produced and label thereon, marked Exhibit A.

Commonwealth Rests.

Counsel for Defendant moves to dismiss as to Mr. Lewis, on the ground that there is nothing to connect him with this case whatsoever, he not being a principal who made the sale and not being either an agent or employe covered by the statute. It having been testified that he was not present when the sale was made, and so far as the testimony shows there being nothing to connect him with; and also as to Mr. Lewis and Mr. Crowl both, on the ground that there is no proof in this case that the substance sold was ice cream, as charged in the indictment. The expert on the stand testifying for the Commonwealth positively refusing to state that it was ice cream; and further, that there is absolutely no proof before the Court that it was chocolate ice cream or that it did not contain fruit or nuts.

93 The Court: I don't know about the case against Mr. Lewis. Mr. Lewis seems to have been a partner; at least there is some evidence tending to show that he and Mr. Crowl were partners. I think we will proceed with the case; we can decide that question at the conclusion. Really, so far as the Court can see, it does not make any material difference. There are some cases where the Court perhaps would direct a verdict. I don't see in this case how the defendant Crowl could — prejudiced by allowing both defendants to remain charged for the present. We will see what the evidence shows.

Dr. JOSEPH A. DEGHUEF, sworn, and examined by Mr. Carlin, testified as follows:

Q. What is your profession?

A. I am an analytical and consulting chemist, engaged at present in practice at the Lederle Laboratories in New York City.

Q. Are you a graduate of any college or university?

A. I am a graduate of Columbia University, where I studied chemistry, taking the usual four years' course, and after graduation I took a post graduate course, also in chemistry, taking the

94 degree of Master of Arts and doctor of Philosophy.

Q. Did you afterwards do work in chemistry?

A. I have been practicing chemistry for 21 years. I graduated in 1890. After graduation I became the assistant of Prof. Chandler, the professor of chemistry at Columbia University, and assisted him in the teaching of physiological chemistry at the college of physicians and surgeons, which is the medical department of Columbia. In 1896 I became chemist to the New York City department of Health. The work of the chemist of the department of health is very similar to the work of the state food chemist, covering the examination of



food on sale in the city of New York. Since 1904 I have been with the Lederle Laboratories as director of the department of chemistry.

Q. In your work as director of the department of chemistry do you analyze food samples?

A. Constantly.

Q. Ice cream samples?

A. Constantly.

Q. Have you analyzed several hundred samples of ice cream?

A. Several hundred, and with the aid of my assistant I have probably analyzed several thousand.

Q. Are you familiar with the various methods of analyzing ice cream?

A. I am.

Q. Are you familiar with the Hortvet method?

A. I am.

Q. Is the Hortvet method a recognized method?

A. Well, I shouldn't call it a recognized method in the sense that it is a method which is commonly described in the books and publications generally on food chemistry and the analysis of ice cream. The only place that the Hortvet method is described is in the report of the chemist of the state of Minnesota, and Mr. Hortvet, or Dr. Hortvet I believe, he is, is the chemist of the state of Minnesota and he described this method as one which he used in his testing.

Q. Have you made analysis of chocolate ice cream?

A. I have; a considerable number of analysis of chocolate ice cream.

Q. Have you compared this method with certain other methods?

A. I have. I conducted an investigation, making the determinations of the fat by different methods on the same sample of ice cream—in this case chocolate ice cream. I have used, to the best of my recollection, about half a dozen different methods on the same sample, in order to compare them and see how the results compared.

Q. Was one of those methods used the method which you have heard described, the method used by Evans?

A. It was. I have used both the Hortvet method, properly speaking, that is the method as described by Dr. Hortvet in his report, and the method as was described in my hearing by Mr. Evans. They differ in some degree.

Q. In any essential particular?

A. Yes, sir, I should say in a very essential particular.

Q. And what is that?

A. That is in the method of drawing off the diluted acid in the first step in the process. The method as described is to weigh out a certain amount of ice cream into a bottle, such as was shown here in a bottle of this kind. The melted ice cream is weighed out into such a bottle. Then a dilute sulphuric acid is poured on that ice cream, an acid which is diluted two parts of one to one of acid. That is shaken up, the object being to dissolve out the sugar in the ice cream and leave the curd of the milk and cream; will get in the form of a cheese—will lie there a cheesy mass. That curd also holds

the fat. The bottle, after the addition of this acid, is put into a so-called Babcock machine, which is simply a centrifugal machine that can be whirled at a rapid rate, and containing cups. These bottles fit into cups, so that when the machine is whirling the bottles

lie there flat and the lighter portions of the liquor, in this case the curd and fat, come to the top, and when the machine stops the bottle settles down gently into an upright

position and the fat and curd are floating on this liquid. Now, according to Mr. Evans' description he has taken a pipette, which is simply a straight glass tube with a blow-pipe in the center of it and drawn to a point at the end, and he put a little water in the end of the stem of the pipette, the lower end of the stem, and plunged that through the fat and curd floating on this liquid and drew off what he called the clear liquid lying below. There is just where he differs from the method described by Dr. Hortvet. In doing that naturally in plunging a pipette through a layer of curd and fat there is some agitation of that—throws some down into the liquid, and there is great danger in drawing that up by entering at the end of the pipette. That is, the way the liquid is drawn up—in drawing up some of that fat and curd into the pipette. Now Hortvet tries to avoid that very difficulty by using a tube fitted into this bottle, which is fitted in through a stopper in the end of the bottle, a narrow glass tube which runs to the bottom of the bottle and curved over, so that it can be used as a suction pipe afterwards. He puts that in before he whirls the bottle, so that when he whirls it the fat and curd come to the top above the end of the tube and

he does not have to plunge the tube through the layer of curd and fat. Then after the bottle comes to a rest he attaches a suction to that, either with his mouth and rubber tube or syphons it over, starts it and draws it over, syphons that over and draws off that liquid. Then he puts in some water, puts back his tube and repeats that operation, in order to wash his curd and fat. In that way he avoids that one difficulty of the method of plunging the tube through the fat layer. I would call that a very essential change in the method.

Q. Until you heard Mr. Evans testify as to his method, had you ever heard of that method that he described, that modification ever being used by any chemist?

A. I never have.

Q. Is the Hortvet method a generally recognized method among chemists as a proper method of testing ice cream?

Objected to as leading.

The Court: I think it is leading.

Q. In your opinion would you say it was an accurate and correct method?

Objected to.

The Court: Put the question in such a way that he cannot answer yes or no, and let him state.

Q. What would you say in comparing the method used by Mr.

99 Evans, his modification of the Hortvet method, with other methods, as to its accuracy?

A. It is not an accurate method when applied to ice cream. I might say that all these centrifugal methods, even the so-called modified centrifugal methods, are originally designed for condensed milks—sweetened condensed milks—the object being to wash out the sugar, as I have already stated and as Mr. Evans stated. Where the mixture is nothing but milk and sugar the methods work very well, they give accurate results; but in a product like ice cream they do not give accurate results. The fact that these methods do not give accurate results is very generally recognized not only by chemists with whom I have discussed the subject, but find it generally stated so in the authorities.

Q. Have you made personal experiments?

A. I have, a considerable number of them.

Q. Using the same sample?

A. Yes, sir.

Q. Can you give us any of those results?

A. Yes, sir. In general there are two classes of methods for determining fat; the centrifugal method, of which the so-called Hortvet is one, based on the principle of whirling out the fat as I have already described, the final result being a column of fat in the neck of the bottle just as this. That depends on the centrifugal force of the machine whirling out the light fat to the top of the heavier column of liquid.

100 The other class of methods depend on dissolving out the fat by means of a suitable solvent, just as you dissolve sugar in water. Fat will dissolve in sulphuric acid, for instance. Those are called the extraction methods. They depend upon an entirely different principle from the centrifugal methods. Now I have compared several centrifugal methods with several extraction methods, working on the same sample of ice cream. The centrifugal methods invariably give low results, for various reasons. The extraction methods give correct results, provided the extraction is carried on long enough. In some materials, such as ice cream, it is necessary to carry on the extraction with these solvents a much longer time than it is in the case of an ordinary milk or a condensed milk; some product which is not as complex as ice cream. My results varied with the different kinds of ice cream, as different flavors have an effect on the taste. Chocolate ice creams are particularly difficult to handle by centrifugal method and they give very low results, results which are absolutely worthless so far as showing any true percentage of fat in the ice cream. This is due to the fact that chocolate contains a cellular material very much like the fiber of wood. Chocolate is a natural vegetable product, the so-called chocolate bean.

101 It has a structure. It is made up with cells in which the other ingredients of the bean are contained. Now these cells are composed of the same material which goes to make up wood and contain this cellulose. The chemist commonly calls this material crude fiber. That is a general term which covers this material in most food products. Most natural food products like

chocolate or cereals contain this crude fiber. This crude fiber will not dissolve in strong acid, consequently it goes with the curd. In a chocolate ice cream, where there is a material amount of this crude fiber, this crude fiber will go with a curd in the fat in the first precipitation. It is left behind when the material is washed with water and finally when the material is treated with strong acid it still remains there as a solid material. Now the idea of the Babcock method is this: that in taking a milk, a condensed milk or cream, that milk or cream is treated with an acid which is strong enough to dissolve everything but the fat and make a clear solution there of everything with the fat floating around in it. Then this bottle is put into the centrifugus and whirled and finally filled up with water and again whirled until there is a clear column of fat in the neck of this bottle. Now the whole accuracy of this test depends on the fact that the material therein but the fat is dissolved. If any solid material remains there undissolved that affects the test in two ways; in the first place some of it, as has been described here, comes up into the fat column, it works up a certain distance into the fat column, making it absolutely impossible to get any clear, sharp lower edge of that fat column. Now these bottles are graduated to read percentages of fat when a certain amount of material, eighteen grams of material, are taken for the test and each little division there represents two tenths of one per cent. It is a little division which is about one sixteenth of an inch. Now unless that lower edge of the fat column is very sharp it is impossible to read that within several of those divisions and affects the test in that way. But the test is affected more seriously in a second way, having the solid floating material in the liquid. That solid floating material, especially a material like this crude fiber, which swells up and becomes slimy when treated by this strong acid, it holds the fat bound up in the fiber itself and clinging to it and prevents the fat from coming up into that fat column. Now I have tested that out, not only by noticing that I didn't get all the fat in the neck of the bottle, but I have drawn off the upper fat column after whirling out the fat in the ordinary method, drawing that off and washed all of the fat out of the neck of the bottle and then filtered out, put that liquid through a filter, so as to get all the solid material that was floating in the acid and washing that with water so as to wash out all the acid and then put that in an extraction apparatus, which is an apparatus arranged so that the material in the apparatus can be abstracted with the solvent ether, which extracts fat, and obtain a considerable amount, in case of chocolate ice cream as much as three per cent. figured on the original material. Three per cent. of fat which had been held back in the solid material. Now the general result of my tests with this I found that the extraction methods, in one case chocolate ice cream, showed within a few hundredths of  $7\frac{1}{2}$  per cent. of fat, in the chocolate ice cream. The centrifugal methods and the Hortvet method would show—well they were not uniform at all; they would vary from  $1\frac{1}{2}$  to 3 per cent. on that same sample of ice cream.

Q. Have you made any tests as to samples taken from various portions of the can of ice cream?

A. I have.

Q. What would you say, taking a five gallon can, as to the variation of the top of the can with the bottom; how high would it be in percentage on fat?

104 Objected to as immaterial; the evidence upon the part of the Commonwealth shows the sale of this pint of ice cream that it is not material to show what there might have been in some other part of the can or in some other part of the store.

The Court: In our opinion the only evidence the Commonwealth having offered being in regard to the half pint bought by Mr. Horton, it is not material to show that any different parts of a large can of ice cream would show a greater amount of butter fat than others. It is a question as to the sample or as to the amount shown by the defendants or one of the defendants to the prosecutor. The objection is sustained, evidence excluded and an exception sealed for the defendants.

EMORY A. WALLING, P. J. [SEAL.]

Adjourned until morning.

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*Proceedings of November 16, 1911.*

JOSEPH A. DEGHUEE, recalled by Mr. Carlin:

Q. In your opinion as a chemist is it possible to preserve ice cream for several months, so that it could be produced here before the jury?

A. It is.

Q. Could that ice cream if produced here have been retested as to show the percentage that it contained of butter fat?

Objected to.

A. It could.

Q. Now doctor, will you explain to the jury the necessity for use of these acids in these so-called modified Babcock tests when they are used in testing sweetened and condensed milk?

Objected to.

The Court: Unless you propose to show the ice cream in question was made from condensed milk I don't see the importance of it. Objection sustained and bill sealed for defendant.

EMORY A. WALLING, P. J. [SEAL.]

Q. What is the object in using a dilute sulphuric acid in the Hortvet method: the real Hortvet method, not Mr. Evans' method as described by Dr. Hortvet. What is the object of using this first solution of one and two sulphuric acid?

106 A. The object is to wash out the sugar which is present in sweetened products like ice cream and sweet condensed milk. The ordinary Babcock test as applied to fluid milk or just plain cream.



densed milk without any sweetening were used on the sweetened product, a product containing a considerable percentage of sugar, the result would be that when the strong acid is put into the Babcock bottle, into the small flask, the sugar would char and the liquid would contain a large amount of black charred sugar floating in this liquid, which would not dissolve and which would go up into the neck of the flask, just as the crude fiber does in the chocolate ice cream, and part of it would float around in the mass of the liquid just as the crude fiber does in chocolate ice cream and hold back the fat. Now to overcome that—that has been recognized ever since the Babcock test was devised, that was recognized as a defect in applying this method to a sweetened product, and chemists have been endeavoring to overcome that difficulty, and one of the methods is this one that Dr. Hortvet devises, of washing out the sugar with a dilute acid and drawing it off and then putting on the strong acid on the curd and fat and this way removing the sugar and secondly not having that charred mass, which would make the test  
107 worthless if it were allowed to remain there. It would be impossible to get any accurate readings of fat if the chemist attempted to put the strong acid right on the sweetened product and have all that charred material floating in the liquid.

Q. In testing chocolate ice cream by this Hortvet method, the real Hortvet method now, what is the appearance after this first solution is made, if the fiber from the chocolate bean: where is it in the bottle?

A. The fiber after the first treatment with the dilute acid in the treatment which is designed to wash out the sugar in the fiber will go with the curd and the fat—will float on this dilute acid and will be held there with the curd. The liquid below when an ordinary dilute acid treatment is used will be turbid if the ice cream contains a material like gelatine or gum. The gelatine or gum is not caught in the curd so that it floats around in this dilute acid and makes a liquid that looks about like water that had a few drops of milk put into it. That gum and gelatine floating around in the liquid is drawn off with a syphon or pipette when that acid is drawn off and washed and in drawing that off a little fat goes with it. Some fat floats around with that; it is held there. This gummy material holds  
a little fat and that is one place where fat is lost in that  
108 method; it is drawn off with the dilute acid and wash water.

The fact that that liquid is turbid is the result of my own observation in a number of tests of this kind, and also is mentioned very commonly by other chemists who have written on the subject; written articles and written paragraphs in books on the subject of testing ice cream. There have been several methods devised to overcome that very difficulty. In the second part of the test, where the strong acid is used in the final Babcock test, where the acid is put in to whirl out the fat, after the fat is whirled up into the narrow neck of the bottle, the end of the test the bulb of the bottle is filled with acid, with water on top and then a column of fat in the neck of the bottle—in some portion of the neck. Now this fiber which floats around in the liquid and won't dissolve in the strong

acid is partly whirled up into the fat column, and as I have already described makes it impossible to get a sharp reading; there is no sharp line to read from. It is a guess as to where the end of the fat column is. Part of it is caught in the shoulder of the bottle; isn't able to get up into the neck; is caught. You see the shoulder runs in partly and it is caught in the shoulder of the bottle, and that holds back fat. Now this fiber as I have already said is sub-

stantially the same thing, chemically the same thing as wood  
109 fiber. Every one knows that wood floats on water. This acid is, even when diluted, even when the water is added to it in the final whirling, is half again as heavy as water. Now that will float on water and will surely float on that acid.

Q. Assuming that Mr. Evans testified that this fiber was not on the top, it was on the bottom of the bottle, have you in your experiments ever found that to be so?

A. No sir, never.

Q. In your opinion as a chemist could it be so?

A. It could not, not in a sulphuric acid solution, especially after it has been whirled.

Q. If it is necessary to add an acid to get rid of the sugar, why wouldn't it be equally necessary to get rid of this fiber?

A. It is equally necessary to get rid of the fiber. In the chocolate ice cream no way has been devised by which the fiber can be gotten rid of in a centrifugal method. It is just as essential that the fiber should not be there as it is that the charred sugar should not be there, because it acts even more actively in holding back fat than the charred sugar would. The fiber is slimy, when it comes in contact with the acid it gets slimy and holds not only on the surface but in the mass itself—buried in the mass itself, the fat and some

of the other materials in that ice cream, so that the acid  
110 cannot get at them and liberate them; whirl them up in the neck of the bottle. The charred sugar is just like charred coal. It is not slimy. The mere fact that it is solid is sufficient to hold back the fat in that case.

Q. Mr. Evans told us that he got a clear reading and a clear solution with the fiber on the bottom of the bottle at the conclusion of his test: in your opinion is that possible?

Objected to as leading.

Q. Assuming that Mr. Evans testified that he got a clear reading at the conclusion of this test, that the fiber was on the bottom of the bottle, that his solution was clear: what have you to say to that from your experience in making these tests:

Objected to, as Dr. Evans did not so testify.

The Court: I think the question is competent: It is on the assumption that he so testified. The jury can remember what he testified.

A. In chocolate ice cream it would be impossible for any portion of the fiber to remain in the bottom of the bottle after whirling.

Q. I understood you to say that this fiber carried with it fat?

A. Yes, the fat. The fat clings to this solid material.

sticks to it, and consequently could not be in the neck of the bottle, and also is what the chemist calls occulted, that is it is concealed in the fragments of fiber, so that the acid cannot get at it and it cannot be carried up as part of the clear fat in the neck of the bottle.

Q. Mr. Ashman testified that it was his opinion, though he had made no tests, that the fiber would not carry fat. What have you to say as to that. Have you actually made those tests?

A. I have actually filtered out that fiber from the bottle, in an actual test, several times—in actual tests on chocolate ice cream. And then taking that fiber and putting it in an abstraction apparatus and dissolving out the fat with ether and obtained varying quantities, in some cases as high as three or three and one half per cent. of fat, which was held there by the fiber, which I actually extracted from the fiber after the test was completed. That is not a thing that could be determined one way or the other by plain reasoning: it is a question of experimental test.

Q. When you refer to the per centage do you refer to the percentage of the entire sample?

A. When I speak of that per centage I am not referring to the original material—the original ice cream.

Q. Mr. Evans testified that in making these tests that he did not give his bottle at the conclusion a hot water bath. What have you to say as to the necessity of a test of this kind?

A. It is very essential and necessary in order to get accurate readings of the fat, in the Babcock test. That is true not only of testing ice cream with the Babcock test but testing anything with the Babcock test. When these bottles are first put into the centrifuge they are very hot. When sulphuric acid is mixed with water it gets very hot; there is a good deal of heat developed, and when you mix milk or diluted ice cream with strong sulphuric acid the acid that is used is almost the full strength concentrated acid, so that when that is mixed with the watery liquid like diluted ice cream or ordinary milk that gets very hot. The bottles are whirled and then finally filled up with hot water so as to bring the fat column up into the narrow portions of the bottle. In the first whirling when the acid and milk or diluted ice cream are put in the bottle it is filled about two thirds full; just a little below the shoulder, in the quantities ordinarily used. That is whirled first. Then the hot water is put in right to the bottom of the neck and the bottles are given one minute whirling again, then they are filled up almost to the top with water and again whirled, so as to bring the fat column up into the graduated portion of the Babcock bottle. That is all done hot. The liquid is very hot in the first whirling and hot water is used to fill up the bottle. Now working in an ordinary room the temperature of the room is very much below the temperature of the bottles, and all the time after the last filling with the hot water those bottles are cooling down, if a hand Babcock machine is used, or any Babcock machine which is not heated. Those bottles are cooling down and the fat column is dropping and the time that is used in taking them out of the machine and reading them that bottle is constantly cooling

—surrounded by cool air. That acts just like a thermometer. The bulb is cooling. Naturally that drops. That column is dropping constantly and as it drops the fat column is away at the top of the liquid, the top portion of the liquid, and as it drops it is dragging the fat column down this narrow neck of the bottle. Naturally it is impossible to draw a fat column along a narrow tube of glass like that without leaving some fat clinging to the glass. There is a film of fat on that glass; it is greasy, above the fat column. It may be too thin, that film so thin it cannot be seen by the eye, but it is impossible to draw a fat column down over glass without leaving grease sticking to it. Now that grease film is fat and all that

114 fat that is left sticking to that glass is fat that is not represented in the fat column, and these divisions it doesn't take much fat to make up one or two of those divisions, consequently the reading is low. The final result that is gotten is low by just the quantity that is left sticking to that glass. For that reason the method that is always used where careful fat determinations are made by the Babcock test the bottles are taken out of the machine and put in a hot water bath—stood in hot water so as to keep them hot, so that contraction won't take place, and that if the contraction has taken place below the limit of the temperature that is prescribed for the Babcock test the reverse action will take place. It will be pushed up some and it will gather into the fat column and read with the rest of the fat. That is the object of the water bath. The water bath is a convenience to the chemist in addition to being more accurate: that he can put his bottles after they are whirled, put them in a hot water bath and they will stay where they were when he took them out of his machine and he can read them at his leisure; but that is a mere matter of convenience.

Q. Mr. Ashman testified that he obtained the same results with an abstraction method as he did with this method which Mr. Evans told him about. In assuming that a man takes an abstraction method, carefully carries it out, and assuming also that 115 takes this method of Mr. Evans and carefully carried it out in your opinion as a chemist would it be possible for him to obtain the same results?

A. Not on a chocolate ice cream.

Q. Assuming, as was testified to here, that this acid used would dissolve fiber, would it then also dissolve nuts?

A. It certainly would. The nuts are made up of fat and starch and fiber; a great deal of fiber, and the fiber is just the same character of the fiber of chocolate, the same chemical character, and anything that would dissolve fiber in chocolate would also dissolve the fiber of the nuts.

Q. In your opinion is it a proper test in testing a sample of cream for nuts to look at it and taste it.

Objected to as immaterial, unless they propose to show this nut ice cream.

The Court: Your questions are leading; you are doing most of the testifying; let the witness do the testifying.

Q. In your opinion what would be a proper test to determine whether nuts were present in an ice cream?

A. Examine under the microscope. Take some of the ice cream and put it on a microscopic slide and look at it magnified and you could see the particles of nuts, no matter how finely ground  
116 they were.

Q. What would be your opinion as to the sufficiency of the test of the eye sight and taste of the operator who is working at the sample?

A. Eye sight would be of no use at all in determining the question conclusively. It would depend entirely upon how coarse the ground material was, whether you could see it at all, and especially if a material like ice cream were colored—had a dark color.

Q. Now take a chocolate ice cream, in your opinion would it be possible to taste the flavor of nuts in a chocolate ice cream?

A. No, it certainly would not; the flavor of nuts is a very delicate one and chocolate has a very decided flavor. The flavor of the chocolate would cover up any flavor of nuts.

Q. Until you heard this method described by Mr. Evans, did you ever hear of any chemist using such a method, or ever know of any authority that laid down such a matter?

Objected to.

The Court: Your questions are entirely too leading.

Q. Will you tell us what you previously heard about this method that Mr. Evans used, previously read, before you heard him describe it: what you know as a chemist about the method described  
117 by Mr. Evans?

A. I had never heard of the method exactly as described by Mr. Evans until a couple of months ago, when I heard Mr. Evans himself.

By Mr. Brooks:

Q. Which method?

A. The method which Mr. Evans used in the examination.  
Counsel for Commonwealth objects.

By the Court:

Q. As to what?

A. For determining fat in ice cream; exactly as he described it. I had never heard it until a couple of months ago, when I heard Mr. Evans himself describe it. I knew of the Hortvet method—the method devised by Dr. Hortvet—described in his report, which is in general the same as the one described by Mr. Evans, except as I have already said Mr. Evans has introduced a feature of manipulation which is not in the method as described by Dr. Hortvet himself.

By Mr. Carlin:

Q. How long does it take to make an accurate fat determination of chocolate ice cream?



A. That would depend to some extent on the method used. The extraction methods will differ in the length of time they  
118 take. The extraction method which I have found to give the most satisfactory results takes—I have never actually timed it, but I should say it would take 24 hours of actual work. It takes actually 16 hours—should have from 16 to 18 hours of extraction—that is, it should be under the effect of the ether for at least 16 hours, and possibly a few hours more would cover the other features of the test.

Q. In your opinion as a chemist, are the extraction methods the only accurate methods for determining?

Objected to.

The Court: I think you went over that yesterday.

Q. What would you say as to the accuracy of this method described by Mr. Evans, for determining the amount of butter fat in chocolate ice cream?

Objected to, as having been gone over before.

The Court: I think so; I think he said the method was not good.

Q. In your opinion, assuming that an ice cream showed under the test as used by Mr. Evans that it contained 2.7 per cent., in your opinion as a chemist might there well have been actually present in that sample more than eight per cent of butter fat?

Objected to.

Objection sustained on the ground of the question being leading.

119 Q. Assuming that a sample of chocolate ice cream tested by Mr. Evans' method showed 2.7 per cent., what amount might it have actually contained, in butter fat?

A. It might contain almost anything above that. I have actually found cases where the test showed six per cent. below the actual quantity there by this method.

Cross-examined by Mr. Brooks:

Q. You obtained your education in the chemical department of Columbia University?

A. Yes sir.

Q. You heard Dr. Evans and Dr. Ashman testify?

A. I did.

Q. They received their educations in institutions similar?

A. Yes sir; I think Dr. Ashman said he was in the same university.

Q. Now you say that after you graduated from Columbia you took a post graduate course?

A. Yes sir.

Q. And you have been practicing about 21 years?

A. Yes sir.

Q. Now in 1896 I think you said you became chemist of the city of New York?

A. Chemist in the Health Department of the city of New York.

120 Q. And that was a position similar to the state chemist in the different states?

A. Well the work is somewhat similar. It is an actual salaried position.

Q. How long was you in the employ of the Health Department of the city of New York?

A. For eight years.

Q. I think you said you had examined several thousand samples of ice cream?

A. I said with the aid of my assistants.

Q. When did you begin examining these ice cream samples?

A. When I went into the Health department. The bulk of my work on ice cream has been since I came from the Health department.

Q. You began in 1896?

A. In the Health department.

Q. But you say a large share of your examination of ice cream samples has been since you left the Health department?

A. Yes sir.

Q. How did you happen to examine these samples when you were in the Health department of New York City?

A. Samples brought in by the inspectors in general food work. Simply to keep informed of the character of food on sale.

Q. What was the purpose: what would you examine them to determine?

121 A. We examine principally for preservatives—injurious material—and we used to run butter fat determinations in order to determine the general amount of fat.

Q. Then back as far as 1896, when you went into the Health Department of New York, they were investigating this proposition of the requisite amount of butter fat in ice cream?

Objected to.

The Court: You can ask if he was investigating.

Q. Back in 1896, when you went into the Health Department, you as the chemist for the Health Department were investigating this proposition as to the requisite amount of butter fat in ice cream?

Objected to.

Q. To investigate the amount?

A. In connection with general examinations of ice cream I used to determine the total solid matter in it. I used to determine figures—see the amount of sweetening and determine the fat. That as in connection with the general examinations of ice cream as a food product.

Q. And you continued those examinations all during your term as chemist of the health department of New York City?

A. Yes sir, at intervals. I didn't do it to as great an extent as I did since leaving the health department.

Q. Since you have left the health department for whom have you been making these examinations of ice cream?

122      Objected to.  
            Objection overruled, evidence admitted and exception sealed  
for defendants.

EMORY A. WALLING, P. J. [SEAL.]

A. Principally for ice cream manufacturers.

Q. To determine what, have you made these examinations for ice cream manufacturers?

A. Various questions will come up. I have cases of ice cream sent to me to determine whether it contains gelatine or other gums; whether it contains condensed milk. Sometimes for general composition of the ice cream. Ice cream manufacturers want to know what their competitors are making and they send me the samples and want me to tell them as near as I can; also in making routine tests for their own products.

Q. You are now in the employ of these same ice cream manufacturers?

A. For some of them, yes.

Q. How much do you get a day for testifying?

A. My per diem charge is \$50.

Q. And expenses?

A. And expenses.

Q. Chemistry is an exact science, is it not?

A. Not as exact as we would like to have it. It is not an exact science in the same sense that mathematics or astronomy is.

123      an exact science.

Q. It is just about next to it?

A. No, I wouldn't say that. It is a comparatively inexact science in a great many departments of the work.

Q. Hasn't chemistry practically come to be known among scientific men in the scientific world as an exact science?

A. Well, that term exact science is not——

Q. Answer my question.

A. When compared with mathematics or astronomy it is comparatively an inexact science. When compared with some other sciences like sociology or biology it is an exact science. It is a matter of comparison.

Q. Sociology is not a science, is it?

A. It certainly is.

Q. I thought it was an art?

A. I would call it a science.

Q. You start on the general proposition that the Babcock bottle which you have in your hand receives its name from the author of the Babcock method?

A. Yes sir, Prof. Babcock devised the method.

Q. And Dr. Babcock's method of extracting fat from milk and cream is the official method?

A. Yes sir, for milk and cream.

Q. So you agree with Dr. Evans and Dr. Ashman, insofar as the method used after the sugar was extracted is the official

124      method?

the official method for milk and cream. Milk and cream don't contain any added cane sugar and consequently there is no necessity for using all this preliminary work. In testing the ordinary official Babcock method is simply to take a certain amount of the material and put strong acid on it and whirl it.

Q. I understand, but the Hortvet method is a method used in conjunction with the Babcock method, as testified by Dr. Evans, for the purpose of determining the fat in ice cream?

A. No, it is not. That is misleading, to answer it simply with a no.

The Court: You can answer with a no and explain.

A. It is not—the Babcock method used in conjunction with another method. It has some of the features of the Babcock method adapted to use in another method.

Q. Do you know what the Hortvet method is?

A. Yes sir.

Q. What it is?

A. Do you want me to describe the method?

Q. What is the Hortvet method for?

A. It is intended to determine fat. I suppose you mean the Hortvet method as applied to ice cream. It is intended to determine the amount of fat in a sample of ice cream.

125 Q. Then that is the Hortvet method?

A. That is the Hortvet method as applied to ice cream. Dr. Hortvet devised his method originally for determining fat in condensed milk.

Q. Then there is a method known to the chemical science as the Hortvet method to determine the fats in ice cream?

A. There is a method which has been described by Dr. Hortvet for that purpose.

Q. Dr. Hortvet is the head of the dairy and food commission of the state of Minnesota?

A. He is the state chemist; not the commissioner.

Q. And that is the man who has given to chemistry this method?

A. Yes sir.

Q. I think you said that the use by Dr. Evans of the pipette would not give as satisfactory results as if he had used the syphon for drawing off the diluted sugar?

A. Yes sir.

Q. How much variation would there be between the two?

A. I couldn't tell; it is entirely a question of manipulation. The difficulty of operating is greater in that test, the danger of loss of fat is greater. What elements of danger that is none can say; that depends on the operator.

126 Q. That is a Babcock bottle similar to yours?

A. Yes sir. substantially the same as mine. That was a pipette before it was broken.

Q. That is a syphon?

A. Yes sir, except that Dr. Hortvet recommends using a narrow tube.

Q. After you put your sample of ice cream in a bottle you dilute that with sulphuric acid, two parts of sulphuric acid to one of water.

A. I think it is the reverse: one of acid and two of water.

Q. After that bottle is put in there how many grams do you put in the bottle?

A. Usually anywhere from nine to twelve.

Q. Then after that you put the syphon in before you agitate it.

A. Before it goes into the centrifuge. Of course these are things that Dr. Hortvet recommends.

Q. You put that in and it goes clear to the bottom?

A. Yes sir.

Q. Now doesn't the syphon fill up with the diluted ice cream to the same height in the syphon as it is in the bottle outside of the syphon?

A. Yes sir.

Q. Then when you apply it to the whirling motion the portion of the substance which was in the tube still remains in the tube?

127

A. Yes sir. Dr. Hortvet recommends to blow it out.

Q. Then when you start after that to draw out the liquid in the bottom the portion that was in the tube is in there and that comes out first?

A. I have already said Dr. Hortvet realized that fact and in his description of the test especially says "blow out the portion of liquid in the tube—gently blowing that out so it goes up into the—"

Q. Then whatever fat there might have been in that tube when you blow it out of course goes into this stuff in the bottom?

A. Yes sir. As I have already said Dr. Hortvet recommends using a very narrow tube. This is by no means a narrow tube. Dr. Hortvet recommends in his description of the test putting in two tubes: one that is to go to the bottom of the bottle, the other to form an air vent, simply passing right through the stopper, and they are both to be put through a cork or rubber stopper and fastened at the top of the neck, consequently it would be impossible to use a tube anywhere near that diameter. Now a very narrow tube would contain very little liquid when being put in, consequently that little liquid will contain very little fat, and moreover you blow it out, the amount of fat that gets in there is not much at all.

128 Q. The method used by Dr. Evans is after this bottle has been whirled in the centrifuge he takes these instruments here, puts his finger over the top, keeping it air tight?

A. Yes, sir.

Q. Now, then we have this filled up to here, with the liquid you want to get rid of down below, the curd and fats are here?

A. Yes, sir.

Q. Now with his finger up there you run that down?

A. Yes, sir. You see the difficulty is when he pushes that down that so much of the fat sticks on the end and is crowded down therefore some of the fat gets out. My own objection to that was pushing it through a layer of fat and crowding it causes a commotion in the upper layer of curd, which stirs it up and very fat



destroy some of the effect of the whirling motion that you have used already to bring that curd up. That is not only my own observation. The fact that Dr. Hortvet so carefully devises a method to overcome that difficulty shows that he has experienced the same difficulty.

Q. Do you mean to try to make this jury believe that by taking that bottle absolutely quiet in the hand of the chemist that he could not put that down through there without driving any of that curd substance down, so as to come out in the bottom there?

A. I mean to say he would be taking very grave risk of doing that very thing, every time he did it. In fact in most centrifugal methods, even Dr. Hortvet's device, is not considered satisfactory, but the liquid is syphoned off thru a filter, through a piece of cloth, so as to catch any of those little particles which are drawn off occasionally and wash them back into the flask. That is a common observation that those little particles do go off.

Q. That was your objection?

A. That was my objection.

Q. Don't you think that when you blew on here with sufficient force to force the fat that was accumulated in the top of that tube and all the stuff in that tube the same depth as the stuff in the bottle, don't you think when you blew that out there it would agitate the contents of the bottle fully as much as putting the pipette down through there?

Objected to.

A. Of course, if you blew a blast of air through the bottle.

Q. I asked if you blew enough to get that fat; you talk about the curd and fat that sticks on the bottle: now if it stuck on there why wouldn't it stick on the inside of that smaller tube and why wouldn't it require a little force to blow it out?

A. There is very little of it, on account of the narrow tube. You are using a very wide tube. The amount of liquid in the tube would be extremely small and when blowing that out you watch the column of liquid and blow very gently. In fact the best way to do it would be not to blow at all, but use a pressure from some other source—water pressure—a blow that so gently a watch the liquid so you let out only a single bubble of air.

Q. I think you said you put nine to twelve grams in this Babcock bottle?

A. That is a matter of convenience; chemists vary in the amount they use.

Q. In that nine grams of cream about how many grams of chocolate would there be, in chocolate ice cream?

A. That depends on the chocolate ice cream; I couldn't tell that; that varies very widely in different chocolate ice creams.

Q. Give us the average?

Objected to.

Q. Ten per cent. would be very strong chocolate?

A. Yes, sir, I think that would be very strong chocolate.

Q. Suppose there would be ten grams of the ice cream, there would be about one gram of the chocolate?

A. Approximately.

Q. What proportion of that chocolate is fiber?

131

A. That will vary in different chocolates.

Q. I am talking about the chocolate put in ice cream.

A. They use both chocolate and cocoa.

Q. In chocolate.

A. The fiber in chocolate will run around 3 or  $3\frac{1}{2}$  per cent. if it is the pure chocolate, without any of the cocoa butter taken out.

Q. Then there would be about one thirtieth of a gram of fiber in that nine grams of ice cream.

A. Assuming your figures, yes.

Q. Now then after you have taken the sugar out with the syphon or with the pipette, then you put in another solution?

A. Wash with water. That is simply to rinse out the last of the acid.

Q. Don't you put in some strong sulphuric acid?

A. Before the final whirling. It is first washed with water. It is diluted up to about the capacity of the bottle as it would be after using an ordinary fluid milk. In other words, it is diluted with water to about  $17\frac{1}{2}$  cubic centimeters, then the strong acid is added.

Q. After you add the second acid into this bottle, about how many grams do you have in the bottle?

A. It would be about 35 cubic centimeters; it would be something over that in grams, because the liquid is heavier than the water; possibly forty grams. I haven't figured it out, but that would be approximately.

132 Q. Then at the time this reading is made up here there are in this bottle from 35 to 40 grams of contents?

A. That is about right.

Q. And of that about one thirtieth of one gram is chocolate fiber?

A. Approximately.

Q. Then one-nine-hundredths of the contents of that bottle, or one one-thousandths, is chocolate fiber?

A. In weight. If it is 40 grams it would be  $1/1200$ ; if 35 about  $1/1000$ .

Q. You think that that  $1/1100$  of a gram of fiber would retard the fat from going up into that bottle?

A. I know so; I don't think so at all. It is not a question of thinking.

Q. By the extraction method the fats are separated by solvents are they not?

A. Yes, sir.

Q. I think you said though that sulphuric acid would dissolve the fiber?

A. No, sulphuric acid will not dissolve fiber. As Mr. Evans

Mr. Ashman, I forget which, explained, in the destruction of crude fiber and crude products generally, the material is first boiled with acid and then boiled with alkali, but what is left is the crude fiber, so that the crude fiber does not dissolve in acid.

Q. Do you say the fiber in chocolate such as is used in ice cream will not be separated, or dissolved, by sulphuric acid such as used in this Hortvet test?

A. It will not be dissolved by sulphuric acid.

Q. You explained about the extraction method and the fact that ether would take out the fats; does not that method extract the fat out of the chocolate?

A. Certainly.

Q. Then by the ether method in addition to getting butter fat you have the chocolate fat?

A. That is true of all these methods; no difference in that respect in any of them.

Q. The Hortvet method does not extract the chocolate fat?

A. It certainly does.

Q. In addition to the butter fat in this test he also had the chocolate fat?

A. Yes, sir, he certainly did.

Q. About what proportion of that fat would you say was chocolate fat?

A. There again it depends on how much chocolate there was in it, and whether it was chocolate or cocoa.

Q. There wouldn't be very much chance for chocolate fat in 2.7 per cent?

134 A. I shouldn't think so, if that were all the total fat there.

Q. What proportion of chocolate is fat?

A. You are talking now of chocolate and not cocoa? It will vary anywhere from 48 to 56 per cent. It will average about 51 or 52 per cent.

Q. What is cocoa butter?

A. Cocoa butter is the name applied to cocoa fat—to chocolate fat.

Q. Then over one half of the chocolate is fat?

A. As a rule, yes.

Q. You wouldn't say this emersion you have testified to here is recognized as an official part of the test: would you say as a chemist that the emersion that you have talked about here is an official part of the test?

A. No, that part of it is not. The fixed temperature is.

Q. Then why did you lay so much stress on saying that this emersion should be made in order to arrive at the correct test if it is not officially recognized as a part of the test?

A. Fifteen years' experience in making fat determinations by the Babcock test has taught me that.

Q. Fifteen years' experience in trying to get as much fat out of that ice cream as possible?

A. Not ice cream. I have made far more tests on milk  
135 and cream with the Babcock test than ice cream.

Q. Do you mean to say that you have to take a microscope to find out whether there are nuts in ice cream?

A. I didn't say you have to; I said you might have to, to determine the fact conclusively. If the nuts are finely ground you couldn't see them by any means except with the microscope.

Q. When you eat nut ice cream don't you know it?

A. Some times I do and some times I don't. If I eat it without knowing it I cannot say. I may have eaten nut ice cream a number of times without being conscious of the fact.

Q. When you order nut ice cream and you have to have a microscope to find out whether there are any nuts in there, you do not think you are getting nut ice cream?

Objected to.

Objection overruled, evidence admitted and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

A. If I order nut ice cream I should probably want to be conscious of the fact that I was eating nut ice cream.

Q. And if you ordered fruit flavored ice cream, when you got it you would want to be conscious of the fact you was eating it?

A. I think I should.

Q. You usually are?

136 A. I wouldn't want to say that.

Q. What if the object of putting fruit in ice cream?

Objected to for the reason that he is not qualified as an expert on the manufacture of ice cream, and what the purpose is of putting fruit in ice cream is entirely outside of the case.

The Court: I don't know that the witness has any expert knowledge about putting fruit in ice cream.

By Mr. Carlin:

Q. In speaking of this Hortvet method and its difficulties and comparing it with this rapid method of improvement that Mr. Evans has testified that he used, you don't wish us to understand that you approve of that method: the Hortvet method or the Evans method?

Objected to.

The Court: I don't see as that is very important.

Q. In speaking of the chocolate fiber, of its comparison in weight would its bulk compare differently than its weight?

Objected to.

Q. What would you say as to that?

A. There is a wide difference between the weight of a material like fiber floating around in the liquid and the relative bulk. This fiber when treated with acid as I have already said swells up and gets slimy and looks like a great deal more when it is floating around in the liquid than it actually is when filtered

out and dried and weighed. It is not just the fiber: it is fiber and moisture and acid and things clinging with the fiber, so that the comparison of the actual weight without any idea of the bulk is entirely misleading. That is true not only of fiber floating around in the liquid like this, but it is true of a sediment floating in a bottle of water or liquor. The sediment when the bottle is held up looks like an enormous amount of sediment, but when it is filtered out and dried it is almost nothing at all. In that respect a comparison of the weight with the bulk is far different.

Q. In regard to this hot water bath and its use in the official method, by the official method you refer to the method for testing milk and cream, not ice cream?

Objected to as leading.

Q. What do you mean when you refer to the official method?

A. The official method for determining fat and cream in milk, by the Babcock test.

Q. And does that official method prescribe anything in regard to the temperature at which the reading must be made?

A. It does; it prescribes these readings shall be made between the temperature of 130 and 150 degrees Fahrenheit.

Q. And what is the object of the hot water bath that you spoke of?

The Court: I think he has explained that.

Q. Have you made actual experiments yourself with taking samples from various portions of a brick or sample of ice cream?

Objected to.

Q. Have you made the experiment?

The Court: The objection is sustained; the question is leading. Exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Have you made any experiments in regard to the taking of samples from various portions of a can?

Objected to as immaterial.

The Court: We will allow that question, as preliminary.

A. I have.

Q. Will you state what the result of your experiments was?

Objected to as immaterial.

The Court: That is the same question we had up yesterday afternoon. I am still of the opinion that is not material to this case. The objection is sustained and an exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

By Mr. Brooks:

Q. During the final process by which the fat is forced up into



the neck of the bottle, it is forced up there by this centrifugal motion in the machine?

A. Yes sir.

Q. Do you mean to say that this small amount of fiber, which you say is light and bulky, that that would get in the way of the fat and prevent the fat from going up into the neck of that bottle?

A. No, I didn't say that: I didn't say it got in the way of the fat or prevented it from going up into the neck of the bottle. I said some of the fiber went up into the neck of the bottle with the fat and so combined with the fat or mixed with it that it was impossible to get a sharp reading of the fat column, and also that this solid material, this solid fiber floating around in the liquid held fat particles, either on the surface or in the slimy mass, so that it did not separate and go to the top. The whole idea of the Babcock test is to dissolve everything in the milk product and leave only the fat, so as to allow the fat free to collect in the narrow neck.

Q. And the object is to have all of the light materials at this end of the bottle?

140 A. No, the heavy materials at this end.

Q. And the light materials in this end?

A. In the neck.

Q. You say some of this does stick to it and prevents the reading?

A. It goes up into the fat column.

Q. Then wouldn't the fat column be increased by just as much as the fiber sticks and goes with the fat into the fat column?

A. If you read the fiber of course. It would simply be a case as to what the per centage of fat shown there was.

Q. But you make your reading on the bottle?

A. Some place on the bottle.

Q. You don't go down here and take out a little bit for fat and down here a little for fiber?

A. That is just the difficulty of the test.

Q. You read everything that is in that bottle in the fat column?

A. If you did you might find ten per cent. of fat that only contained three.

Q. If Dr. Evans read everything in that column he read, in addition to the fat he got some fiber?

A. He was reading liberally in the column, but he wouldn't be reading the fat that was in the fiber.

Q. Do you mean to say as a chemist that after this test has been applied, after this has been placed in the centrifuge that the fat that might be in there could be held from going up into the neck of the bottle, by that little fiber?

A. I have already said that I don't only believe it but I have taken the fiber out of the bottle, washed it with water, put it into the apparatus and actually got the fat out, so I could see it and weigh it—out of the fiber—out of the fiber that was floating in the liquid.

Q. How much fiber was in the fat up here?

A. I didn't weigh that; that I washed out of the fat.

Q. Then you mean to say this 1/1100 part of fiber could hold the

fat down in this part to an appreciable amount and the fat which is supposed by this operation to be put up in here would not have any fiber in an appreciable amount in it?

A. No, I wouldn't say that.

Q. Isn't it a fact the chances of the fiber being in the fat column would be greater than the chance of the fat being in the other part where the fiber is supposed to be?

A. You are talking about chances. That is just the objection I have to the test; It is guess work.

Q. What do you say about that?

A. Well, it might and might not.

142 ALBERT W. SMITH, sworn, and examined by Mr. Carlin, testified as follows:

Q. What is your profession?

A. I am professor of chemistry at Case school of Applied Science in Cleveland.

Q. Are you at present professor there?

A. Yes sir.

Q. What university are you a graduate of?

A. I graduated first at the University of Michigan, then at Case school.

Q. At the University of Michigan did you take a course in chemistry?

A. Yes sir.

Q. Four year course?

A. Yes sir.

Q. Then at Case school. Where is that?

A. Cleveland. Then at the University of Zurich in Switzerland, where I got a doctor's degree.

Q. What year did you graduate from the University of Michigan?

A. 1885.

Q. And since that time have you been continuously engaged in your practice as a chemist?

A. Not in practice. I was a student a part of the time. I have been engaged as a professor at Case school since 1891.

143 Q. During that time you devoted all your time—

A. I have been employed all this time by the Case School, and at the same time I did work in other directions. For four years I was chemist for the Ohio Dairy and Food Commission.

Q. And during all of that time have you examined food products?

A. Yes sir.

Q. Have you made any examinations of chocolate ice cream for determining fat: the contents thereof?

A. Yes sir.

Q. Did you make any determination by the method you have heard Mr. Evans describe?

A. Yes sir.

Q. And did you make any determinations by the Hortvet method?

A. No.

Q. Did you make any determinations by any other method?

A. I made in the same sample in which I made the determination by Mr. Evans' method, determinations by three other methods.

Q. Will you tell the jury just what your findings were and how you made these tests, in a general way?

A. In the sample of chocolate ice cream I first made a determination by absorbing the weighed sample with dry fat free  
144 gypsum or calcium sulphate, drying the sample, placing it in a capsule and extracting with pure ether. The second method was to use in the place of fat free calcium sulphate or gypsum fat free filter paper. This is known as the Adams method. And then extracting the dry portion with pure ether.

The third method was known as the Roesse-Gotlieb method, in which the sample is mixed with water and the solution extracted with a mixture of gasoline and ether.

The results obtained by these three methods were concordant. The greatest variation I think was two-tenths of one per cent, each method being carried out in duplicate.

On the same sample I then made eight attempts to determine the fat by the method described by Mr. Evans, and obtained results varying from 1.5 per cent to 4.1 per cent.

These three methods are the three general ways in which fat is determined in milk and cream.

Q. In your opinion as a chemist what would you say as to the use of any centrifugal method for the determination of butter fat in chocolate ice cream?

A. I think in some ice creams it might be possible by the Hortvet method to get reasonably accurate results, but I think in chocolate ice cream or any ice cream where there is a residue not soluble  
145 in sulphuric acid that it is impossible to get accurate results by this method; by any centrifugal method.

Q. Comparing the results obtained by the extraction methods and by this method of Mr. Evans, what did you find to be the difference in percentage of fat?

A. The sample that I examined contained six and one half per cent of fat by the extraction methods, and the lowest result I obtained by Mr. Evans' method was one and five-tenths per cent, a difference of five per cent. The smallest difference was 2.4 per cent.

Q. Did you find the extraction methods always brought out more fat?

Objected to.

Q. What did you find as comparing the method as to the amount of fat?

A. I invariably obtained higher results by the extraction method.

Q. In your opinion as a chemist is it possible to preserve ice cream and bring it into this court room before the jury, so it could be tested?

A. Yes sir.

Q. In testing chocolate ice cream by this method of Mr. Evans will you please tell us just how the fiber of the chocolate appears

the different stages of the operation and what the effect of that is, if any?

146 A. The Babcock test for determining fat in milk products is based on the fact that strong sulphuric acid dissolves everything in the milk except the fat; that the sulphuric acid is heavier than the fat, and therefore when you invert it in this machine the fat rises to the surface by centrifugal force. If there is anything in the mixture that is not soluble in the sulphuric acid the method is inaccurate, necessarily so, because this insoluble material necessarily will hold some of the fat which cannot escape from it, for that reason the method as applied to chocolate ice cream, which has this insoluble fiber in it, is inaccurate, because the fiber is mixed with the fat and there is no part of the process that is designed to separate it from the fiber, it stays with the fiber. I know that this is so in a sample of chocolate ice cream because I separated the fiber from the acid after removing the fat. That is to say, I made the regular test as described by Mr. Evans, collecting what fat I could in the neck of the bottle, then I removed the fat in the neck of the bottle carefully with dry paper, poured out the acid and fiber remaining in the bottle, diluted it with water, filtered it through a fat free paper capsule, washed it clean with water, dried and extracted it with ether and obtained 2.6 per cent fat as calculated upon the original sample of ice cream remaining in this fiber. I think it would be perfectly apparent to any one that if you mixed water with oil and put it in a bottle of that kind and then put in some shredded tissue paper, just a little bit, and shake it up there a short time and let it stand, or whirl it, that the paper, since it is lighter than the water, would retain some of the fat, prevent it coming up in the neck of the bottle. I think that can be seen by any one. That would be the result that the filter paper would stay down in the top of the bottle largely and retain some of the fat, and that is exactly what occurred in testing this ice cream.

Q. Mr. Ashman testified it was his opinion that the fiber would not convey away any fat, although he had never made any test. What is your opinion as a chemist?

A. I know by observation it does contain the fat, and a considerable portion.

Q. What would you say as to whether or not there was a clear solution at the conclusion of this test as used by Mr. Evans: is the solution clear when chocolate ice cream is used?

A. I think Mr. Evans was deceived because the liquid is dark colored. It is impossible to see through the bottle with the acid in it, because it is so dark colored, the material which the sulphuric acid has dissolved makes the mixture dark so that it is not possible to look through that and see whether the fiber is there or not; but if you take that same material and dilute it with water and filter it then you can find this fiber in all cases of chocolate ice cream I have examined.

Q. Mr. Ashman testifies that by using this method that Mr. Evans told him about, and by using an extraction method, he obtained the same results. In your opinion as a chemist is that possible?

Objected to as leading. Objection sustained and exception sealed for defendants.

EMORY A. WALLING, P. J. [SEAL.]

Q. Mr. Ashman testified that——

The Court: It is not a question of Mr. Ashman testifying. It is a question of his opinion.

Mr. Carlin: I believe I have a right to state to him the testimony.

The Court: It has not been the practice in this court to recite the testimony of one witness to another. Prof. Smith can state whether the same results can be obtained or not.

Q. In your opinion as a chemist can the same result be obtained by the extraction method as by the centrifugal method in chocolate ice cream?

Objected to as leading.

The Court: That is a leading question, but I guess we will allow it.

149 Q. What is your opinion as to that? What is your opinion as to the possibility of obtaining the same result by an extraction method and by a centrifugal method such as described by Mr. Evans?

A. I don't think it is possible to obtain the same results by those two methods. My reason for so thinking is that I personally tried, after twenty years' experience as a chemist and trying all sorts of methods, I personally tried to get the same results and was unable to do so, by a considerable difference.

Q. If sulphuric acid would dissolve crude fiber would it also dissolve nuts?

Objected to as leading.

Q. What would be its effect on nuts?

A. The effect would be very much the same; they are the same kind of material.

Q. Would sulphuric acid dissolve fiber?

Objected to.

The Court: That is a leading question.

Q. What is the effect of sulphuric acid on fiber?

A. Its only effect if it is strong is to char the fiber.

Q. Any other effect?

A. No.

Q. What in your opinion is a proper test as to the presence of nuts in an ice cream?

150 A. I should think the proper test would be a microscopic examination.

Q. What is your opinion of the test such as described by Mr. Evans, for the determination of butter fat in chocolate ice cream?

Objected to, that the proper question would be what in the science of chemistry, not what his personal opinion might be.



The Court: It is his opinion as a chemist. He is testifying as an expert. I think the question is proper.

A. I think it is quite worthless as a method for obtaining accurate results of fat in chocolate ice cream.

Q. Assuming that Mr. Evans using his method found two and seven-tenths per cent. of butter fat in ice cream: what would you say as to the amount of butter fat which might be present in the said sample?

A. If the sample were chocolate ice cream I should think there might be almost any amount present. One wouldn't know. My greatest difference was five per cent. That would make it seven and seven-tenths per cent.

Q. Is there a difference between the bulk of fiber and the weight of fiber in the chocolate ice cream, making this test in the bottle?

A. There would be quite a difference.

Q. Will you explain that to the jury?

A. The fiber when mixed with the acid swells up, gets very loose and spreads out over a good deal of space, while when it is dried and weighed it contracts to a very small amount.

Cross-examined by Mr. Brooks:

Q. You are now a chemist in Case school?

A. I have charge of the chemical department of Case school.

Q. For how many years have you been interested in investigating ice cream for the purpose of determining the amount of butter fat?

A. I think when I was connected with the state Dairy and Food Commission I had several samples of ice cream to analyze. I never analyzed any great number of them, but I have analyzed a great many analogous materials for fat. A very large number.

Q. Since you were with the state dairy and food commission your business has not been such as required you to make examination of ice cream for the purpose of determining the amount of fat?

A. Not especially ice cream, but a great many similar materials.

Q. Then you have no especial occasion to use the Hortvet method?

A. I have never used it before.

Q. When did you first use it?

A. On this case.

Q. How long ago?

A. About two weeks ago. In fact I never heard of it before.

Q. Then up until two weeks ago you knew nothing about the Hortvet method?

A. It is not a method given among the literature except one state bulletin, and that is where Dr. Hortvet is chemist.

Q. Dr. Hortvet is considered a very high class man in his line?

A. Yes sir, but he did not design this method for chocolate ice cream nor for any other material which contained matter insoluble in sulphuric acid.

Q. He designed it for ice cream generally?

A. He designed it as a modification of the Babcock method. The

Babcock method assumes and necessarily must have all the material soluble in sulphuric acid.

Q. What would be the difference between chocolate ice cream and coffee ice cream?

A. The difference would be that ordinarily the coffee ice cream would be flavored with a clear extract of coffee, while chocolate ice cream is a mixture of the cocoa bean with the material and the bean contains all of the substance, soluble and insoluble.

153 Q. A person who has used a certain method so long that he has become familiar with it is more apt to get an accurate test than one who does not know anything about the particular method?

A. Not if the method is fundamentally wrong.

Q. The personal equation amounts to the same in chemistry as it does in other lines of science?

A. Not in applying a method that is fundamentally wrong.

Q. An astronomer who has been looking for a certain planet for twenty five years is more apt to get nearer to it than one who has never looked for it?

A. It depends on the method. If he was looking through a tube without a lense he would not find it.

Q. From your experience with a chemist of the standing of Ashman and Evans do you think they would make an examination without the proper appliances?

A. I know they did because they so testify.

Q. You know they attempted to do it without the proper appliances?

A. I do.

Q. Do you base your reason upon the improper test upon the same ground that the other doctor who testified before based his?

A. I base it upon my opinion itself of the method. I know it is an improper method because the fiber necessarily holds some  
154 of the fat, which does not rise into the tube of that instrument.

Q. Do you say it would have been right if he had used the syphon instead of the pipette?

A. It would not have been right for chocolate ice cream. He might have got higher results, but not correct even then. The method is fundamentally wrong.

Q. As well as extracting the butter fat you extract the chocolate fat?

A. You get all of the fat that is there, in both cases. You get the mixture of the two fats. In the extraction method you get it all out and in the other case a part of the mixture.

Q. You say by the sulphuric method you get part of the fat out of the chocolate?

A. In both ways you get part of the fat.

Q. Then you differ from Dr. Deghnee?

A. No, he said the same thing.

Q. Then the sulphuric acid does separate the fiber from the chocolate?

A. A part of it. No, I didn't say that. I said the sulphuric acid separates the fiber from a part of the fat, but not from all of it.

Q. Then it starts a dissolution process of the chocolate fiber?

55 A. It chars the fiber.

Q. The only difficulty in your mind about this whole process is the small particles of fiber detaining the fat in the bottle and not allowing it all to go into the neck?

A. That is not the only difficulty. There is still a difficulty by the method Evans described, a part of the fat is carried out with the wash with the pipette and I found that so by three experiments. Getting this material out as carefully as possible with the pipette, filter it thru paper, washing it clean and getting the fat from that part washed out by the method described by Evans.

Q. These fibers retained the fat instead of going up into the bottle?

A. That is right.

Q. I think you said this fiber was very light?

A. It is very much lighter than the sulphuric acid in which it is mixed. The gravity of the sulphuric acid is about one and one half times that of water.

— How does it compare in weight to the fat; that is to the butter fat?

A. It is a little heavier than the butter fat. The gravity I should say was about twenty per cent. heavier.

Q. Heavier than the butter fat?

A. Yes, sir.

Q. But lighter than the sulphuric acid?

56 A. Yes, sir. So that in this test it would be at the surface most of it, as Mr. Evans described it.

Q. It would be at the surface of the acid after whirling?

A. Yes, sir.

Q. But it would be below the butter fat?

A. Mixed with the butter fat.

Q. Then it would be mixed up with the butter fat in the process of whirling and the general mixup?

A. Yes, sir.

Q. Then if there was some butter fat in the neck of the bottle there would also be some of the bulky fiber?

A. Yes, sir, very apt to be. It stays in both places; part of it stays below the neck and part is apt to come up in the neck, and to read the fat column you have to read it from where the fiber leaves off and fat begins and since the two are mixed it is impossible to get the column.

Q. Do you mean to say that while the fiber would retain the fat in this portion here (indicates), that the fiber would not be mixed with the fat all through the tube?

A. It is apt to be. It generally stays in the little portion just below the fat.

Q. You think it would mix down here but not up there?

A. I said it was mixed up there. My experience is this with

the method; that from up here at the top would be a column  
 157 of clear fat, below that a column of fat and fiber mixed together, down in here would be some more fiber that didn't get into the top at all because it was so narrow. This portion would retain some of the fat and this some of the fat. The column that one reads is what is above the rest.

Q. How much do you get a day for testifying?

A. I have no bargain with the gentleman that employed me, but I expect to charge \$50 a day and expenses.

Q. Who are you working for?

A. I was employed by the Lederle Laboratories of New York City.

Defendant rests.

158 JAMES A. EVANS, recalled by Mr. Brooks:

Q. When you made your test what if any difficulty was there in discerning the point at which the butter fat appeared at the neck of the bottle?

A. There was no difficulty; I had a sharp reading, both at the top and bottom. The top part there was no dragging down of the fat down the tube; in fact they are read within half a minute of the time you stop, and the temperature was a few degrees probably above 150, but they were read in such short intervals of time that there is no dragging down and I had a sharp reading at the top. At the bottom I also had a sharp reading. It was a perfectly clear test and perfectly easily read.

Q. What if any fiber was there separate from the fat in the tube at the bottom: in the neck of the bottle?

A. There was no fiber there. It was a clear sharp reading at the point.

Q. Supposing the fiber did get mixed with the fat, what effect would the whirling process have upon that, as to where it would leave it at the time you made your reading?

A. I didn't mean to say there was no fiber mixed with the fat. What I meant to say was this: that as Dr. Smith described, there was first a column of fat at the upper part of the neck and

159 underneath that another column of fiber there and that would read only the one column. There may have been some particles of fiber distributed in the fat. I don't say that was not. If they were they simply increased the volume and made the percentage larger than they otherwise would, but the percentage of fiber in the whole bottle is so small that it is almost negligible, and if there is some distributed through the lower part of the bulb part of the bottle, you cannot see it, as I stated in my testimony yesterday. The liquid is dark colored and you cannot see through it.

Q. You heard Dr. Deghucé testify as to the proportion of fiber being about 1/1100 of the contents of the Babcock bottle: would you say as to that being about right?

Objected to, that Dr. Deghucé testified that if the contents of

bottle was made up in the manner described to him by the attorney then that might be, but he didn't say the contents of the bottle was that.

The Court: I don't know that he did. He said there was about ten per cent. of chocolate, but I understood him to say that perhaps three per cent of the chocolate was fiber.

Question withdrawn.

160 Q. Taking the sample as you put it in, at the time of the final test, that is when you tested it for the butter fat, about what proportion would there be in there of chocolate fiber: about what part of the contents of that bottle would be chocolate fiber?

A. Of course that would depend on the amount of chocolate put into the chocolate ice cream. As Dr. Deghueé said, ten per cent. would be a very liberal amount of chocolate to put in ice cream, and if you take that as a basis the per centage is very small. It would be probably less than one tenth of one per cent in the bottle.

Q. About how much would that be on the neck of that bottle. Just supposing you take the whole bottle: about how much would it be gathered on there: one tenth of one per cent.?

A. One tenth of one per cent. of butter fat gathered on here is half way between those two small lines. That is if the 18 grams were taken to start with. In this case approximately nine grams or a little over nine grams you would have to multiply the reading by two. It would be about the distance between two of the small lines.

Counsel for Commonwealth offers the Babcock bottle in evidence. Objected to.

The Court to Mr. Brooks: Is that the bottle that was used in this case?

161 Mr. Brooks: Both of them were alike.

Mr. Carlin: It is only part of the apparatus. If there is going to be an apparatus offered we would like it all.

The Court: I don't think it is rebuttal.

Cross-examined by Mr. Carlin:

Q. Do you mean to tell the jury that one tenth per cent. of fiber floating around in the liquid would only occupy that amount of space?

The Court: He didn't say fiber. Butter fat.

Q. Then you don't intend to say that relates to the fiber: that the fiber would only occupy that space?

A. That wasn't the question that was asked me. The fiber that occupied that space I cannot tell you. That depends on the mixture of the ice cream how much there was there. It may be the fiber would occupy less than that amount of space.

Q. The fiber floating around in the liquid would be all swelled up?

A. If it is charred it is not swelled very much. If it is charred it is rather contracted instead of swelled, and the strong sulphuric acid tends to char it to some extent.



Q. Would that swell before it was charred?

162 A. It depends on the acid that is used. The charring as soon as the strong sulphuric acid is added there the heat is generated to a great extent above that of the boiling point of water and this strong sulphuric acid with this heat does char those substances.

Q. What about the weak sulphuric acid that you put on first. Doesn't that swell it?

A. That may swell it some. I don't know. But it is charred at the time the final reading is made.

Q. But it is floating around in the liquid?

A. I don't know it is.

Q. I understood you to say yesterday you got a clear reading. Is that right?

A. I said that this morning, that I had a clear reading of the butter fat.

Q. And now to-day you tell us you had two columns: one of fiber and one fat?

A. No sir, I said just the opposite of that.

Q. You hadn't two columns?

A. No sir, I said just the opposite.

Q. Do you say now you didn't have two?

A. I say I didn't have two columns. I had a sharp reading at the top and a sharp one at the bottom.

Q. Was there any fiber in the neck below the fat column?

163 A. I don't think there was. I don't state positively there wasn't but I don't think there was. I didn't see any. The lower part of the bulb is very dark colored from the strong sulphuric acid. It is opaque and you cannot see through it. Above that on the final addition of the water it is rather transparent and you can see through and on top of that is the butter fat and there was a sharp reading between the butter fat and that final addition of hot water and immediately below that column of fat was a water liquid and didn't contain a mass of fiber.

Q. Then the fiber was not on the bottom at your final reading at the bottom of the bottle?

A. I said I didn't see any there.

Q. Didn't you say yesterday that at the conclusion of the test the fiber was on the bottom of the bottle?

A. No sir.

Q. Are you positive of that?

A. I said the lower part of the bottle was all charred and black and opaque and you cannot see through it. A few little particles of fiber which are microscopic in size in a dark liquor like that you cannot see them.

Q. Did you say in this case there was no fiber?

A. In the bottle altogether?

Q. Yes.

A. No, I certainly didn't say that.

164 Q. Was there any in your fat column?

A. I just said a moment ago there might have been.

Q. You don't know?

A. There certainly wasn't a great deal. If there was it increased the column and made it a larger reading than it was; not a smaller.

Q. Is not the fat column clear so you could see the fiber if there was any in there?

A. No, you cannot see those fibers; they are microscopic sized. They are ground first and small and mixed in the mass; you can't see them; you can't distinguish them singly.

Q. You say they couldn't be seen with the naked eye?

A. They don't float around like a stick of any size whatever.

Q. What temperature do you say you made this reading at? 150

I understood you to say to-day: is that right?

A. No, I said slightly above 150. I said yesterday the temperatures I determined were 150 to 160.

Q. Those temperatures you determined had nothing to do with this sample?

A. Yes sir, they had this much to do with it, they were run in exactly the same way.

Q. In this sample what would you say the temperature was?

A. I presume between 150 and 160.

165 Q. That is merely your presumption?

A. It is borne out by taking identical cream.

Q. Isn't that your presumption as to this sample?

A. No, I don't think so.

Q. Didn't you tell us yesterday your temperature was about eighty centigrade?

A. No sir, you asked me and I said I didn't think it was. I said I made several tests exactly the same and took the temperature and they ranged from 150 to 160. That is just slightly above 150.

Q. Didn't I ask you whether you said 85 centigrade and you said no, you said 80?

A. At the Alderman's hearing I said the temperature we were discussing was 80 and I said it was approximately that by the touch of my hand, but not by the thermometer.

Q. Eighty centigrade is what Fahrenheit?

A. 176.

Q. That is not 150, as you testified this reading was?

A. I didn't testify this reading was 150.

Q. Did you take out this fiber or look in this bottle to make any test whether there was any fiber in there or not?

A. No.

Q. And you are positive now that if there was fiber there that could not be seen with the naked eye and that it could not be seen if it was present in the fat column. Is that true?

A. No, I didn't say that. It might be in sticks big enough to be seen. You can get it in very large chunks, but where it is finely ground like this sample was you would not see it.

Q. You would not say that in a test of a chocolate ice cream a chemist cannot see with the naked eye the fiber?

A. I will say I didn't see the fiber.

Q. You won't say that cannot be seen in other tests?

A. No, I don't say that.

Commonwealth Rests.

Proofs Closed.

### 167 Gentlemen of the Jury:

The defendants, A. W. Crowl and W. F. Lewis, are on trial before you upon an indictment charging them with selling ice cream deficient in butter fat. The indictment was drawn under a section of an act of Assembly which reads like this: "No ice cream shall be sold within the state containing less than eight per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six per centum of butter fat."

Another section of the Act imposes a penalty: makes the violation of any part of the act a misdemeanor and imposes a penalty therefor.

The first question is: "Did the defendants sell ice cream?" The evidence for the Commonwealth as to that is the evidence of G. M. Pelton, who is an agent of the Dairy and Food Commission of this Commonwealth. He testifies that the defendants have a place of business in the city of Corry in this county and that he went to their place of business on the afternoon of the 21st day of June last and bought of Mr. Crowl, one of the defendants, a half pint of chocolate ice cream and paid for it the sum of fifteen cents and had it put in a glass jar there in the store and that he labeled the glass jar. If you believe that testimony then there was a sale to Mr. Pelton of this article.

Was it ice cream? Mr. Pelton says he bought it for ice cream. His testimony tends to show that it was ice cream, and the testimony of the chemist, Mr. Evans, who analyzed it according to the evidence the same afternoon, also is to the effect that it was ice cream.

It is a sale of ice cream containing less than a certain amount of butter fat which is prohibited. The indictment says that it was not flavored with fruit or nuts. You see this act of assembly says they shall not sell ice cream containing less than eight per cent. butter fat except where fruit or nuts are used for the purpose of flavoring. Now the indictment charges, and had to charge, that this ice cream did not contain fruit or nuts, and the burden is upon the Commonwealth to prove that. You must find, before you convict the defendants, that the ice cream did not contain fruit or nuts as a flavor. Upon that you have the testimony of the chemist, Mr. Evans, that he sampled it, looked at it, tasted it, that it did not have any fruit or nut flavor. I do not know whether Mr. Pelton testified upon that subject or not. Mr. Evans, who is a chemist, says he could tell by the looks whether it had nut flavor and by the taste and smell and that it didn't have, and whether it had fruit flavor, and that it didn't have, and Prof. Ashman, also a chemist called here for the Commonwealth, whose home is in Pittsburg, testifies that by the taste and sight you could discover whether or not it had nuts or fruit

169 flavor. It is necessary for the Commonwealth to prove that

dictment, and it was necessary for the Commonwealth to so allege. If you find that this was ice cream, that the defendants sold it to Mr. Pelton, and that it did not contain nuts or fruit for flavoring, then you will take up the next question. "Did it contain less than eight per centum butter fat?" That would perhaps seem to be the most important question in the case. On that you have the testimony of Mr. Evans, who says he analyzed it that same afternoon, the 21st of June, and he tells you how he analyzed it, by the Babcock method for analyzing milk and cream. The Babcock method seems to be a standard method under the U. S. Government as modified by Dr. Hortvet of Minnesota. Perhaps Dr. Hortvet's modification has reference to the analyzing of ice cream as distinguished from milk or cream.

Now Mr. Evans tells you how he made this analysis. You saw him on the stand and you heard his testimony. He tells you what he did and how he did it, and he says he found 2.7 per cent. of fat, as I recall his testimony, which would be much below the standard. If you believe that his analysis was accurate and that his testimony is truthful, why then from that you would have a right to conclude that it did contain much less than eight per cent. of butter fat.

Dr. Ashman says that the methods which Mr. Evans says he adopted and used in this analysis would produce a substantially correct result. Prof. Ashman says that he has recently analyzed ice cream on the same method, and then also by another method which he explained to you, and that he obtained practically the same result. His testimony would corroborate the testimony of Mr. Evans as to the accuracy of the method used by Mr. Evans.

That Hortvet method as I understand, or Babcock method—Hortvet modification perhaps—is to put the substance that is to be analyzed, the ice cream in this case, into a glass receptacle and put in certain other matters which you heard—acid and water—whatever it was—you will remember the methods and then perhaps at a certain temperature to subject it to a certain whirling motion, which is supposed to separate the butter fat from the balance of the substance; centrifugal motion which throws it in one place—separates it from the mass. You will remember that; it is not for the Court to enlarge upon that method. And Mr. Evans and Prof. Ashman testify that that would produce a correct result.

On behalf of the defense you have the testimony of Dr. Deghuae, of New York and of Dr. Smith of Case School in Cleveland, both chemists of considerable experience according to the testimony, and their testimony is opposite to the testimony of the chemists called here for the Commonwealth. In the first place they say you could not tell whether the ice cream had a fruit or nut flavor in it by looking at it, or by taste or smell; that you ought to subject it to the microscope. You will remember that testimony. Then they also tell you that the method used by Mr. Evans is worthless—that is the effect of their testimony—as applied to ice cream. They say the Babcock test would not be right, or the Hortvet test



would not be right, as applied to chocolate ice cream. They tell you that the proper way to examine chocolate ice cream would be not by this whirling centrifugal motion test, but it would be by extraction or abstracting the fat from the other substances in the ice cream and one of them at least tells you that the operation would take from eighteen to twenty four hours, and should be done by putting in some chemicals and allowing the mixture to stand until the fat would be extracted. That is a proper matter for you to consider. Dr. Smith said that he has recently made a test of chocolate ice cream, as I understand from his testimony, and that by these extraction tests he obtained six and one half per cent. of fat, perhaps of butter fat—you will remember about that—and that he tried the Hortvet test, the test which Professor Evans says he tried, and that he tried it perhaps several times and only got from one and five-tenths to four and one-tenth per cent—that the tests differed to that extent and he says his three other tests that he applied by different methods were substantially the same and made six and one half per cent. He says that the test made by Mr. Evans might be wrong by five or six per cent.; might lack that much getting out all the fat from the mass of material which was subjected to chemical analysis.

Mr. Evans said that he used in extracting the sugar perhaps—extracting at least some substance before he got down to making the test as to the amount of butter fat in the substance—that he used a pipette, which he introduced into this substance, and with which he extracted or took out this sugar—at least some of the substances other than the butter fat. He tells you how he did it and that is a little different from the Hortvet method. I understand the Hortvet method to be to abstract this substance by a syphon, but Mr. Evans said it was a shorter cut and just as good in his opinion to use the pipette, and he says he did use that. The chemists for the defence both tell you that in using that pipette a portion of the substance would be liable to adhere to the pipette or be withdrawn with the pipette and that that would not be a proper way of treating the substance. You will remember that testimony.

They also testify—these experts—that in the use of this kind of bottle some of the fat would collect upon the shoulders of the bottle inside, and that that would not be proper unless you kept it subjected to some hot water test, which you will remember—hot water treatment.

173 Then they also tell you that chocolate has a fiber in which is not dissolved by the acid that was applied, or which Mr. Evans says he applied in making his test; that there would be a fiber of the chocolate, and they tell you that that fiber would perhaps rise at least part way to the top of the bottle, maybe up to the fat, being perhaps heavier than the fat and lighter than the acid, and that the fiber being sort of wet and fluffed up and slimy would hold a considerable portion of the fat. You will remember that testimony. And they give those various reasons why in their opinion the test that was made in this case by Mr. Evans is not reliable. The defence asks you to disregard it. Now you will remember all



testimony of the experts, on both sides; the case depends to a considerable extent upon the testimony of the experts.

It is urged here on behalf of the Commonwealth that the amount of the fiber under the evidence was only perhaps about one part in a thousand, in weight, although perhaps more than that in bulk; that it was not large enough to hold any appreciable amount of the oil or butter fat. Prof. Evans says in rebuttal that it would only be a negligible amount; that is, very small, not worth mentioning, in amount.

The experts for the defense say the Babcock test is all right for milk and cream, but that the Babcock test with the Hortvet modification is not right when it comes to examining ice cream which  
174 has a fibrous substance in it, or any substance in it that is not dissolved before the test is made.

It is urged here on behalf of the defense that the Commonwealth should have kept a part of this sample so it might have been produced here in court. Well, that is a matter for the jury to consider. You heard the witnesses for the Commonwealth and the witnesses for the defense; you will have to decide the case according to the testimony. That might be a circumstance proper for you to consider.

Where the evidence of experts is conflicting you should try and arrive at the truth. You saw them, you heard their testimony; you saw Prof. Evans and Dr. Ashman, you saw Dr. Deghuee, and Dr. Smith. Now you must use your own common sense and experience as men and consider the probabilities of the case, the probabilities of the facts to which they testified, their manner of testifying, their apparent frankness or otherwise in the case. They are not interested parties. It is brought out here for the defense that Mr. Evans gets three dollars for each examination that he makes—each analysis—paid by the Commonwealth of Pennsylvania; and it is brought out here on behalf of the Commonwealth on cross examination that Dr. Deghuee is to have \$50 a day and that Dr. Smith expects \$50, although his fees have not been fixed. But you will probably conclude that all these men are trying to tell the truth and if  
175 they do work on either side it is proper they should have a reasonable compensation. Those are matters proper for you to consider in passing upon the testimony.

The defendants ask us to answer certain requests which they submit, which are proper for the Court to answer and which we will now proceed to do.

1st. That the defendants are presumed to be innocent until proven guilty.

Answer: That point is affirmed. When the Court affirms a point it means that the point correctly states the law as the Court understands the law. When we refuse a point it means that it is not correct as a whole, as the Court understands the law.

2nd. That the burden of proof is upon the Commonwealth to establish the guilt of the defendants.

Answer: Affirmed.

3rd. That unless the jury find from the evidence that the defendants are guilty beyond any reasonable doubt the defendants should be acquitted.

Answer: That point is affirmed. The doubt which would justify a jury in acquitting should be a reasonable, well-founded doubt, arising from the evidence. It should not be a mere fanciful doubt.

176 but it should be simply an honest, well founded doubt. you are satisfied beyond such a doubt then you should convict; if you have such a doubt you should acquit. This being a criminal case, before you convict you should be certain to a reasonable certainty that the defendants are guilty. If you feel certain to a reasonable certainty then you haven't any such reasonable doubt. If you are so sure of it that if it were some important matter of your own, that you would be willing to accept the fact as true and act upon it, then that would be sufficient upon which to base a verdict. You should consider the case fairly and see whether you are satisfied beyond such a reasonable doubt. If you have such a doubt then you should acquit; if you have not then convict.

4th. That each and every juror should be satisfied beyond a reasonable doubt of the guilt of the defendants before bringing in a verdict of guilty.

Answer. That point is affirmed. That don't mean that when you go out and first take a vote you must all think alike, but that means that after talking it over and discussing it with your fellow-jurors you must all concur in the verdict. If you find a verdict of guilty it is the verdict of the twelve men, the final deliberate verdict of the twelve men. Of course you all have to agree upon the verdict, whatever it is.

177 5th. That the Act of Assembly under which the indictment is drawn has been repealed by the Act of Assembly of May 13, 1909, and therefore the verdict of the jury must be not guilty.

Answer. That point is refused.

6th. That unless the jury find from the evidence that the product sold was chocolate ice cream the verdict of the jury must be not guilty.

Answer. That point is affirmed. You will have to consider all the evidence in the case on that question and determine whether or not it was chocolate ice cream.

7th. That unless the jury find from the evidence beyond a reasonable doubt that fruit or nuts were not used for flavoring in the product sold the verdict of the jury must be not guilty.

Answer: That point is affirmed, as I have already explained in the general charge.

8th. That if the jury find from the evidence that the guilt or innocence of the defendants depends upon the accuracy or completeness of a chemical analysis of the substance sold, that they should be satisfied beyond any reasonable doubt that said analysis was accurate and complete before convicting the defendants.

178 Answer. That point is refused. It starts out by saying that if it depends upon the accuracy or completeness, then it ends up by saying that they must find it both accurate and complete. If it depends gentlemen upon, and it does depend largely upon, a chemical analysis, before you convict you should be satisfied

beyond a reasonable doubt that that analysis was reliable. We cannot say that you must be satisfied that it was accurate and complete in all its details, but you must be satisfied that it was sufficiently accurate and sufficiently complete to be trustworthy. You must have reliance upon it and that and all the testimony in the case must satisfy you of the guilt of the defendants beyond a reasonable doubt.

Ninth. That unless the jury find beyond any reasonable doubt that the product sold was ice cream, and that it contained less than eight per cent butter fat the verdict of the jury should be not guilty.

Answer. Affirmed.

The defendants' 10th, 11th, 12th, 13th and 14th points are refused.

Gentlemen, if you convict the defendant you have nothing to say as to the costs.

Mr. Crowl was the man who sold this ice cream according 179 to the evidence of Mr. Pelton. Mr. Lewis did not sell it, was not present at the time it was sold. We have some doubt whether he would be liable for such an act committed by Mr. Crowl, and we therefore suggest and request that as to Mr. Lewis your verdict would be not guilty. It was one act and it is not very important whether you convict two men for it or one, and to put that question out of the case we suggest that in the final verdict whatever it is as to Crowl that it should be not guilty as to Lewis. So whatever instructions we have given you you can consider as between the Commonwealth and A. B. Crowl, the defendant, and you may render a verdict of not guilty as to Lewis, whatever the verdict is as to Crowl.

If you find a verdict of guilty as to Crowl you have nothing to say as to the costs, but if you find a general verdict of not guilty—that would be of course as to both defendants—then you will have to dispose of the costs. That you can do by putting the costs upon the county, or you can put the costs upon the defendant, or you may put the costs upon the prosecutor, in which case you must name him. In this case Mr. G. M. Pelton is the prosecutor. He is a public officer and you should not put any costs upon him unless you believe he acted maliciously. If he acted maliciously you would

180 have the right to put the costs upon him, but if he acted in good faith he ought not to pay any costs because he made a mistake, if you find he made a mistake. You can in a proper case divide the costs, in such a proportion as you see fit, between the prosecutor and the defendants, or, as I have said before, you can put the costs upon the county. If you put the costs upon the county you have to put all the costs upon the county; you cannot divide the costs between the county and either of the parties.

But gentlemen, first decide whether or not the defendants are guilty. It is only in case you acquit both defendants that you have anything to say about the costs. First decide as to the guilt or innocence of the defendants. What I say to you about the costs is simply to give you full instructions, and there is no intimation as to what the Court thinks your verdict ought to be; we give you no intimation as to that. It is a matter exclusively for the jury and the responsibility for a correct decision is entirely with the jury.

not with the court. You should remember all the evidence, whether referred to by the court or not. Give it fair consideration. This is an important case. Not only is it important between these particular parties, but it is important to the Commonwealth in general and to the public and also important to the defendants in this case.

We have no doubt you will continue to give it that same careful consideration that you have thus far given the case.

Before verdict and before the jury retire, counsel for defendants except to the charge of the Court and to the answers of the defendants' points insofar as they were not affirmed without qualification, and request that the charge of the court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and filed of record, which request is granted and an exception noted before verdict.

EMORY A. WALLING, P. J. [SEAL.]

182 Note:

Defendants' 10th, 11th, 12th, 13th and 14th points, which were refused and not read to the jury, were as follows:

10th. That the Act of Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Sec. 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same.

11th. That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same.

12th. That unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted.

13th. That the evidence offered on the part of the Commonwealth is not sufficient to warrant the jury in finding W. F. Lewis, one of the defendants, guilty.

14th. That under the law and the evidence the verdict of the jury must be not guilty.

183 I hereby certify that the proceedings, evidence and charge, are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

CHAR. G. BREVILLIN,  
*Official Stenographer.*

The foregoing record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

EMORY A. WALLING, *Judge.*

Endowment: No. 32, Sept. Session, 1911. Commonwealth vs. A. B. Crowl and W. F. Lewis. Stenographer's Copy. Filed in Clerk of Court's Office, Erie Co., Pa., Jan. 18, 1912. I. E. Briggs, Erie, Pa.

184 THE SUPERIOR COURT OF PENNSYLVANIA,  
County of Allegheny, ss.:

The Commonwealth of Pennsylvania to the Judges of the Court of Quarter Sessions for the County of Erie, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of A. B. Crowl from the sentence and judgment of your said Court, at No. 32 of September Sessions, A. D. 1911, wherein Commonwealth of Pennsylvania is Plaintiff and the above named Appellant is Defendant before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Pittsburgh, the first Monday of August next, to wit, August 5th A. D. 1912 so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the eighth day of July in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

GEORGE PEARSON,  
Prothonotary.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

EMORY A. WALLING, P. J. [L. s.]

Endorsement: No. 71 of April Term, 1913. Superior Court. Commonwealth of Pennsylvania vs. A. B. Crowl, Appellant. Certiorari to the Court of Quarter Sessions for the County of Erie

185 Returnable the first Monday of August A. D. 1912. Rule on the Appellee, to appear and plead on the Return-day of the Writ. George Pearson Prothonotary. Note—No application for the allowance of special supersedeas will be considered unless Rule 37 of the Superior Court is strictly complied with. Filed Aug. 3, 1912. Superior Court, Fifth District. W. J. Carlin, G. T. Kincaid. Filed in Clerk of Court's Office, Erie Co., Pa., Jul-15, 1912.



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Filed Feb'y 27, 1913.

In the Superior Court of Pennsylvania.

No. 71, April Term, 1913.

COMMONWEALTH

v.

A. B. CROWL.

Appeal Q. S., Erie County.

HENDERSON, J.:

The first proposition presented by the appellant is that the title of the Act of March 24, 1909, does not comply with the requirements of section three of article three of the Constitution of Pennsylvania, in that it does not give sufficient notice of the provisions of Section four of the statute under which the indictment was drawn. The title to the act is: "An Act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof and providing for the enforcement thereof." The fourth section provides that: "No ice cream shall be sold within the state containing less than eight per centum of butter fat, except where fruits or nuts are used for the purpose of flavoring, when it shall not contain less than six per centum of butter fat." We need not refer to the numerous cases which hold that it is not necessary that the title to an act be an index of the subjects legislated about. It is sufficient if it comprehend the subject involved and fairly puts the inquirer on notice. This act has a single subject

187      and the title covers it with a comprehensiveness more complete than is usual in legislation. It declares the purpose of the Act and gives notice that penalties are provided for a violation of its terms. One of the things particularly brought to the notice of the reader is that it fixes a standard of butter fat for ice cream, and it was for the violation of the law with reference to this provision that the defendant was convicted. We have no doubt that all of the provisions of the statute are cognate with the title. It is next contended that the enactment is not within the police power of the state in so far as it fixes a standard of butter fat for ice cream. We do not understand that there is any contention that that portion of the fourth section which forbids the manufacture or sale of adulterated or deleterious ice cream is not a proper subject of legislation. We are only concerned, therefore, with the inquiry whether a statute which fixes a standard of quality for ice cream is within the police power. The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use is admitted; that it is largely composed

milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition and all of the authorities to which the learned counsel for the appellant refers show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk of which butter fat is an important constituent. If by the exercise of ingenuity and the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice cream but lacking the chief element which gives its value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power. We are not concerned with the wisdom of legislation under this power. Our inquiry is whether the power exists. Sovereignty is in the people and is expressed through their legislative representatives by enactment of their will into laws. Their authority is general except as restrained by the Constitution of the Commonwealth or the Constitution of the United States, and among legislative capacities one of the largest is the exercise of the police power. It is more fully described than defined, but that it extends to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals can not be questioned and these objects are to be provided for by such legislation as the discretion of the law making body may deem appropriate. It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the Act constitutional. The temptation to fraud and adulteration may be considered leading to regulative or prohibitive legislation. If there were not so courts would become the triers of the expediency of legislation and the authority which the people committed to the legislature would be transferred by judicial action to the courts. Where a statute is clearly and palpably violative of the Constitution it is the duty of the courts to declare it invalid in the respects in which it is repugnant to this supreme law, but the presumptions are all in favor of the validity of legislative enactments and the burden is on him who asserts the contrary to make it clear beyond doubt that the constitutional power has been exceeded. It has been the policy of this state to legislate on the subject of milk and milk products and statutes have been enacted which made it unlawful for any person to sell milk which contained less than a fixed percentage of butter fat and less than a fixed percentage of milk solids; making it unlawful to sell cream which contained less than a fixed percentage of butter fat; which made it unlawful to sell cheese and fixed the percentage of butter fat which the

various classes of cheese should contain; and similar legislation has been enacted in other states: *State v. Campbell*, 64 N. H. 404; *Com. v. Waite*, 11 Allen 264; *State v. Smyth*, 14 R. I. 100. Legislation of a like character is found in the act of May 21, 1901, forbidding the sale of vinegar which contains less than four per cent of absolute acetic acid. If the sale of pure milk containing less than three and one fourth per cent of butter fat may be prohibited it is not apparent why the same principle does not apply to ice cream. Milk is a natural product—wholesome and useful for food. The milk of many cows contains less than three and one fourth per cent of butter fat. The owners of such cattle have a constitutional right to sell the product of their dairies but this right has been held to be subordinate to the public welfare and this welfare demands that a fixed minimum standard of butter fat shall exist in the whole milk sold in this Commonwealth. The known disposition of some dealers to cheat and the opportunity afforded them by the absence of some regulation of the business is the justification of such legis-

190 lation under the police power. Through such laws the consumers have the assurance that that which they buy is what it is called and what it appears to be and the opportunity for imposition in selling an adulterated or inferior article of food for that which is wholesome and of a supposed standard of quality is removed. The integrity of the Act is not affected by the provisions that where fruits and nuts are used for flavoring six per cent of butter fat shall be required in ice cream. It is obvious that the addition of fruits and nuts to a given quantity of ice cream would diminish the percentage of butter fat and it was apparently a consideration of this fact which caused the distinction between ice cream flavored with extracts and that to which nuts or fruits were added. No discrimination is made between individuals or preference given to particular manufacturers by this legislation and no substantial reason is advanced which would make such a regulation destructive of the whole statute.

It is not an objection to the prosecution that it was not commenced by the Dairy and Food Commissioner. That functionary was specially charged with the enforcement of the provisions of the statute but that did not disable any citizen of the Commonwealth from appearing as a prosecutor. The offense is a misdemeanor and a prosecution for a violation of the Act might be instituted by any person inclined so to do.

The appellant further contends that the act under consideration was repealed by the Act of May 13, 1909, relating to food; defining food and providing for the protection of the public health and the prevention of fraud and deception, etc. A comparison of the two

191 Acts shows that the latter contains no provision with reference to the quantity of butter fat necessary in ice cream, nor any provision which is inconsistent with the fourth section of the Act of March 24, 1909, and as there is no express repeal, none arises by necessary implication. An earlier statute is repealed only in those particulars wherein it is clearly inconsistent and irreconcilable with later enactments. The antagonism must be so great as to con-

vince the mind that the last enactment repealed the former. The objects of the two statutes are not the same and if so both can stand, though they may refer to the same subject. Moreover, both of these Acts were passed at the same Session of the Legislature and the latter only a few weeks after the former. Under such circumstances there is a presumption against an implied repeal.

We do not regard the examination suggested in the 12th and 13th assignments as permissible. The evidence of the experts as to the possibility that samples of ice cream taken from different parts of a can might or would exhibit a variation of butter fat content would not aid the jury in determining what were the constituents of the sample which the prosecuting witness bought and which the chemist for the Commonwealth analyzed. Mr. Pelton, a witness for the Commonwealth, testified that he bought a pint of chocolate ice cream from the defendant; that he asked for chocolate ice cream and that the defendant delivered to him a pint of ice cream which had the appearance of chocolate ice cream. It was this pint of ice cream which was analyzed and for the sale of which the defendant was prosecuted. It was shown to have had less than three per cent of butter fat. Theories about what might have been found in some other part of the can from which the witness got his pint would not throw any light on the case. We are unable to obtain a point of view of the case from which we can observe any error in its trial. The case was fairly presented by the learned trial judge and the law expounded in accordance with the principles which govern the case on the undisputed facts.

The assignments are overruled, the judgment is affirmed and the record remitted to the court below to the end that the sentence may be carried into execution.

193 COMMONWEALTH OF PENNSYLVANIA,  
*County of Allegheny, ct:*

I, George Pearson, Proth-notary of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. A. B. Crowl at No. 71 April Term, 1913 as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, sitting at Pittsburgh, as aforesaid, this 10th day of March in the year of our Lord One Thousand Nine Hundred and thirteen.

[SEAL.]

GEO. PEARSON,

*Prothonotary.*

Endorsement: No. 71 April Term, 1913—Commonwealth vs. A. B. Crowl—Exemplification.

Endorsement: Page 47—No. — — — Term, 1913—Commonwealth vs. A. B. Crowl, Appellant. Petition for Allowance of Appeal from Superior to Supreme Court—Mar. 13, 1913, Petition granted: Per Curiam—Filed Mar. 10, 1913, Supreme Court, W. D. W. J. Carlin, New York, Gerry T. Kincaid, of Kincaid & Kincaid, Attorneys at law, Corry, Pa., Attorneys for Appellant.

194 THE SUPREME COURT OF PENNSYLVANIA,  
*Eastern District, City and County of Philadelphia, ss:*

[SEAL.]

The Commonwealth of Pennsylvania to the Judges of the Court  
Quarter Sessions, County of Erie, Greeting:

Whereas, By virtue of our Writ of Certiorari from our Supreme Court of Pennsylvania for the Eastern District returnable in the same Court on the fourth Monday of April in the year of our Lord one thousand nine hundred and fourteen a record was brought into the same Court, upon appeal by A. B. Crowl, from your sentence & judgment made in the matter of No. 32 September Sessions 1911, wherein Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant.

And it was so proceeded in our said Supreme Court, that the following judgment was made, to wit:

The judgment of the Superior Court is affirmed on the opinion of Judge Henderson.

And the record proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the Act of Assembly in such cases made and provided) ordered by the said Supreme Court to be remitted to the Court Quarter Sessions for the County of Erie aforesaid, as well for execution or otherwise as to justice shall appear: Wherefore we here remit you the Record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, 26th day of May in the year of our Lord one thousand nine hundred and fourteen

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

Filed in Clerk of Court's Office, Erie Co., Pa., May 28, 1914.

Endorsement: No. 32, September Term, 1911. Q. S. Erie Co.—Superior Court—No. 71, April Term, 1913—No. 272, January Term 1913. Supreme Court—Commonwealth v. A. B. Crowl, Appellant. Remittitur—Att'y \$3.00—Pro — Rem —.



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In the Supreme Court of Pennsylvania.

— Term, No. —.

In the Superior Court of Pennsylvania.

No. 71, April Term, 1913.

COMMONWEALTH

VS.

A. B. CROWL.

*The Petition of A. B. Crowl.*

To the Honorable the Justices of the Supreme Court of Pennsylvania:

Your petitioner respectfully represents as follows:

First. Your petitioner was the appellant in the above case.

Second. The questions involved in the appeal were:

(a) Is Section 4 of the Act of March 24, 1909, P. L., 63, which provides as follows: "No ice cream shall be sold within the State containing less than eight (8) per centum of butter-fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter-fat," valid under the Constitution of the Commonwealth of Pennsylvania?

(b) Is Section 4 of the Act of March 24, 1909, P. L., 63, valid under the Constitution of the United States?

(c) Is Section 4 of the Act of March 24, 1909, P. L., 63, a lawful exercise of the police power of the state?

(d) Is a statute prohibiting the sale of ice cream, otherwise unadulterated, containing less than a certain per centum of butter-fat a lawful exercise of the police power of the state?

(e) Has Section 4 of the Act of March 24, 1909, P. L., 63, been repealed by the enactment of the food law approved May 13, 1909?

Third. The Superior Court answered the first four questions in the affirmative and the last in the negative. This is the first case in which the higher courts have been called upon to decide the constitutionality of Section 4 of the Act of March 24, 1909, P. L. 63. Numerous prosecutions have heretofore been commenced, and are now pending, under this Section of the Act, by the agents of the Dairy and Food Commissioner of this State, and it is important to the retail ice cream dealers of Pennsylvania that the constitutionality of this Section of the Act should be finally determined. The defendant, a retail ice cream dealer, not manufacturing his own ice cream was convicted under the above mentioned Section of selling ice cream, otherwise unadulterated, containing less than eight (8) per centum butter-fat.

Fourth. An important principle of the extent of the police power of the state is involved. This is the only case in this or in any other state, which the research of Counsel for Appellant has been able to

find, wherein the higher courts held that an Act of Assembly, fixing a butter-fat standard for ice cream is a lawful exercise of the police power of the state, and in no reported case has the extent of the police power been carried so far.

The opinion of the Superior Court is hereto attached and copies of the paper books in the case are submitted herewith.

Your petitioner prays that this Court may allow an appeal  
197 from the Superior Court to the Supreme Court in this case,  
with the same effect as if originally taken thereto.

And he will ever pray.

A. B. CROWL.

STATE OF PENNSYLVANIA,  
*County of Erie, ss:*

A. B. Crowl, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

A. B. CROWL.

Sworn and subscribed to before me, this 8 day of March, 1913.

[SEAL.]

GERRY T. KINCAID,  
*Notary Public.*

My commission expires Jan. 30, 1915.

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In the Superior Court of Pennsylvania.

No. 71, April Term, 1913.

COMMONWEALTH

VS.

A. B. CROWL, Appellant.

And Now, —, the appeal is allowed in the above mentioned case to the Supreme Court, with the same effect as if the appeal had been originally taken thereto.

— — —

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*Docket Entries.*

272.

January Term, 1913.

Q. S. Erie Co.

272.

COMMONWEALTH, Plaintiff,

v.

A. B. CROWL, Defendant.

Appeal of Defendant.

W. J. Carlin, G. T. Kincaid.

Superior Court.

No. 71, April Term, 1913.

From the Judgment Affirming the Judgment of the Court of  
Quarter Sessions of Erie County.

Appeal from the Superior Court. Filed August 1, 1913.

Eo die, Certiorari exit, ret'ble fourth Monday April, 1914.

August 1, 1913.—Assignments of Error filed.

August 4, 1913.—Record returned and filed.

March 10, 1913.—Petition for allowance of an appeal filed.

March 13, 1913.—Petition granted. Per Curiam.

April 27, 1914.—Argued.

May 22, 1914.—The judgment of the Superior Court is affirmed  
in the opinion of Judge Henderson. Per Curiam.

May 26, 1914.—Remittitur exit and with record sent to Clerk of  
Court Quarter Sessions of Erie Co.

00 In the Supreme Court of Pennsylvania for the Western  
District.

Superior Court of Pennsylvania, Sitting at Pittsburgh.

No. 71, of April Term, 1913.

COMMONWEALTH

vs.

A. B. CROWL.

Enter Appeal on behalf of A. B. Crowl, Defendant, from the judg-  
ment of the Superior Court of Pennsylvania, sitting at Pittsburgh,

as per order of Supreme Court, allowing said Appeal, filed 13th day of March, 1913.

To George Pearson, Proth'y Sup. Ct. W. D.

W. J. CARLIN,  
G. T. KINCAID,  
*Attorneys for Appellant.*

COUNTY OF ERIE, ss:

A. B. Crowl, being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believe- he has suffered injustice by the Judgment from which the appeal is taken.

A. B. CROWL.

Sworn and subscribed before me this 15th day of March, A. D. 1913.

[SEAL.]

JOHN HANBERGER,  
*Notary Public.*

My Commission Expires Jan. 18, 1917.

Endorsement: No. 272, January Term, 1913—Supreme Court of Pennsylvania—Western District—Commonwealth vs. Crowl, Appellant—Appeal and Affidavit—Filed Mar. 18, 1913, Supreme Court, W. D.—Filed Aug. 1, 1913, in Supreme Court. W. J. Carlin, G. T. Kincaid, Attorneys for Appellant.

201 THE SUPREME COURT OF PENNSYLVANIA,  
*Eastern District, County of Philadelphia, ss:*

[SEAL.]

The Commonwealth of Pennsylvania to the Judges of the Superior Court, Greeting:

Whereas, Commonwealth, Plaintiff, impleaded A. B. Crowl, defendant, in the Court of Quarter Sessions of Erie County, to — Term, 191—, and thereupon it was so proceeded in that judgment was entered in said Court for the said plaintiff and, Whereas, upon appeal to the Superior Court, the said judgment was affirmed as of No. 71, April Term, 1913, and Whereas, thereupon, to wit, on the thirteenth day of March, 1913, upon due cause shown, an appeal to this Court was allowed.

Now, Therefore, We being willing to be certified of the matter of the said appeal, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the fourth Monday of April 1914, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought —.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the first day of

August in the year of our Lord one thousand nine hundred and thirteen.

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

— —. [L S.]  
— —. [L S.]

Filed in Clerk of Court's Office Erie Co. Pa. May 28, 1914.

02      Endorsement: No. 32, September Term, 1911—Q. S. Erie Co.—Superior Court—No. 71, April Term, 1913—No. 272, January Term, 1913—Supreme Court—Commonwealth v. A. B. Crowl, Appellant—Certiorari to the Superior Court. Returnable the fourth Monday of April A. D., 1914. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Alfred B. Allen, Deputy Prothonotary—Filed Aug. 4, 1913, in Supreme Court—W. J. Carlin, G. T. Kincaid, Attorneys for Appellant.

03      Supreme Court of Pennsylvania, Western District.

No. 117, October Term, 1913.

COMMONWEALTH

vs.

A. B. CROWL.

*Assignments of Error to Judgment of the Superior Court.*

First. The Superior Court erred in not sustaining the first assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point one of the demurrer of defendant, to wit: 'That the indictment does not charge a crime.' Appendix, page —.) By the Court: Demurrer overruled, to which defendants except- and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Second. The Superior Court erred in not sustaining the second assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point two of the demurrer of defendant, to wit, 'That no Act of the General Assembly makes it a crime to sell ice cream containing less than eight per cent. butter fat, as the act approved March 24, 1909, was repealed by the enactment of the so-called pure food law approved May 13, 1909.'



(Appendix, page —.) By the Court: Demurrer overruled to which defendants except- and an exception is sealed." Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

204 Third. The Superior Court erred in not sustaining the third assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point four of the demurrer of defendant, to wit, 'That the Food Acts of March 24, 1909, and May 13, 1909, both commit to the Dairy and Food Commissioners the sole power to commence prosecutions, for their violation and are therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except- and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fourth. The Superior Court erred in not sustaining the fourth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point five of the defendant's demurrer, to wit, 'That the information or complaint and said indictment does not show that the prosecution was commenced by the Dairy and Food Commissioners as required by the Act, but, on the contrary shows that it was not commenced by said official.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except- and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fifth. The Superior Court erred in not sustaining the fifth assignment of error to the judgment of the Court of Quarter Sessions to wit:—"The Court erred in overruling point nine of the 205 defendants' demurrer, to wit, 'That the Act under which the charge is made is invalid, unconstitutional and void in that it violates Section 1, Article XIV of the Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Sixth. The Superior Court erred in not sustaining the sixth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in overruling point ten of the defendant's demurrer, to wit, 'That the Act under which the charge is made is unconstitutional and void under the Constitution of Pennsylvania.' (Appendix, page —.) By the Court: Demurrer overruled, to which defendants except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Seventh. The Superior Court erred in not sustaining the seventh assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing to charge defendants' fifth point, to wit, 'That the Act of Assembly under which the indictment is drawn has been repealed by the Act of Assembly of May 13, 1900, and therefore the verdict of the jury must be not guilty.' Answer. That point is refused. (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the 206 defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception noted before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Eighth. The Superior Court erred in not sustaining the eighth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' sixth point, to wit, 'That the Act of Assembly under which the indictment is drawn is invalid and unconstitutional and void in that it violates Section 1, Article XIV of the Amendments to the Constitution of the United States, and there can be no conviction of the defendants under the same.' (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception noted before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Ninth. The Superior Court erred in not sustaining the ninth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' seventh 207 point, to wit, 'That the Act of Assembly under which the indictment is drawn is unconstitutional and void under the Constitution of the State of Pennsylvania and there can be no conviction under the same.' (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception noted before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Tenth. The Superior Court erred in not sustaining the tenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' twelfth point, to wit, 'That unless the jury find from the evidence that the prosecution was commenced by the Dairy and Food Commissioner of the State of Pennsylvania the defendants cannot be convicted.'" (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception sealed before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

285 Eleventh. The Superior Court erred in not sustaining the eleventh assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in refusing defendants' fourteenth point, to wit, 'That under the law and the evidence the verdict of the jury must be not guilty.'" (Paper Book, page —.) Before verdict and before the jury retired, counsel for the defendants except to the charge of the Court and to the answers of the defendants' points in so far as they are not affirmed without qualification and request that the charge of the Court and defendants' points and the answers thereto be reduced to writing from the stenographer's notes and file of record, which request is granted and an exception sealed before verdict." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twelfth. The Superior Court erred in not sustaining the twelfth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in refusing to permit defendants to prove that samples taken from different parts of the same can would show different percentages of butter fat. This is shown by the following question: 'Would it be possible from the same can, taking a sample at the edge, another at the center and another at the lowest strata, to get three different samples that would vary as much as seven or eight points, if it was a five gallon can?' Objected to as not cross examination. The Court: 'I don't believe that is cross examination. It may be competent in rebuttal to show that, but I do not think it is cross examination. Objection sustained and exception sealed for defendants.'" (Appendix page —.)

290 By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Thirteenth. The Superior Court erred in not sustaining the thirteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in rejecting and excluding the testimony of Dr. Daghorn, who had been duly qualified as an ex-

part, as to the variation in butter fat content of samples taken from different portions of the same can. This is shown by the following question, 'What would you say, taking a five gallon can, as to the variation of the top of the can with the bottom; how high would it run in percentage of fat?' Objected to as immaterial, the evidence upon the part of the Commonwealth shows the sale of this pint of ice cream; that it is not material to show what there might have been in some other part of the can or in some other part of the store. The Court: In our opinion the only evidence the Commonwealth having offered being in regard to the half pint bought by Mr. Pelton, it is not material to show that different parts of a larger can of ice cream would show a greater amount of butter fat than others. It is a question as to the sample or as to the amount sold by the defendants or one of the defendants to the prosecutor. The objection is sustained, evidence excluded and an exception sealed for the defendants." (Appendix, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fourteenth. The Superior Court erred in not sustaining the fourteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "The Court erred in charging the jury as follows 'Was it ice cream? Mr. Pelton says he bought it for ice cream. His testimony tends to show that it was ice cream, and the testimony of the chemist, A. J. [unclear], who analyzed it according to the evidence the same afternoon, also is to the effect that it was ice cream.'" (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Fifteenth. The Superior Court erred in not sustaining the fifteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the second point of defendants' motion in arrest of judgment, to wit, 'That no Act of the General Assembly of Pennsylvania makes it a crime to sell ice cream containing less than eight (8) per cent of butter fat, as the Act approved March 24, 1909, was repealed by the enactment of the so-called Pure Food Law, approved May 13, 1909.'" (Appendix page —). This is shown by the following order: "And, now June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed.'" (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Sixteenth. The Superior Court erred in not sustaining the sixteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the third point of defendants' motion in arrest of judgment to wit: 'That the indictment does not contain a specific description of the offense, and does not describe the offense so that the defendant may know how to answer and that a conviction or acquittal might be pleaded in

bar to another indictment for the same offense.' (Appendix, page —). And now June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —).

Seventeenth. The Superior Court erred in not sustaining the seventeenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the fourth point of defendants' motion in arrest of judgment, to wit, 'That the food Acts of March 24, 1909, and May 1909, both commit to the Dairy and Food Commissioner the sole power to commence prosecutions for the violation of the same and are therefore unconstitutional and void under the Constitution of the United States and the Constitution of Pennsylvania.' (Appendix, pages —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —).

By the Superior Court: The assignments are overruled. (Paper Book, page —).

Eighteenth. The Superior Court erred in not sustaining the eighteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the fifth point of defendants' motion in arrest of judgment, to wit, 'That neither the complaint nor indictment shows that the prosecution was commenced by the Dairy and Food Commissioner, as required by the Act; nor by his direction, or by any one in his employ, but on the contrary shows that it was not commenced by said official.' (Appendix, page —). And now, June 24,

1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —).

Nineteenth. The Superior Court erred in not sustaining the nineteenth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the sixth point of defendants' motion in arrest of judgment, to wit, 'That the indictment is too definite on which to sustain a conviction in that it charges that said defendants did sell, offer for sale, expose for sale, and have in possession with intent to sell, ice cream which violates section 4 of the Act of Assembly, approved March 24, 1909. Whereas the provisions of Section 1 of said Act, making it an offense to offer for sale, expose for sale, and have in possession with intent to sell, apply to the 2nd Section of said Act, and not to the 4th Section of the same.' (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the



defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twentieth. The Superior Court erred in not sustaining the twentieth assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the seventh point of defendants' motion in arrest of judgment, to wit,

213 "That the Act of Assembly of March 24, 1909, known as the Ice Cream Act, in that it attempts in Section 4 of the same, to establish a standard for butter fat in ice cream, and absolutely prohibits the sale of ice cream containing less than the standard of butter fat, no matter how wholesome, is unconstitutional." (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twenty-first. The Superior Court erred in not sustaining the twenty-first assignment of error to the judgment of the Court of Quarter Sessions to wit: "That the Court erred in overruling the eighth point of defendants' motion in arrest of judgment, to wit, That the Act under which the indictment is drawn is invalid and unconstitutional and void in that it violates Section 1, Article 14, of the amendments to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States and deprives them of liberty and property without due process of law and denies them the equal protection of the law." (Appendix, pages —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

Twenty-second. The Superior Court erred in not sustaining the twenty-second assignment of error to the judgment of the Court of

214 Quarter Sessions to wit: "That the Court erred in overruling the ninth point of defendants' motion in arrest of judgment, to wit, 'That the Act under which the indictment is drawn is unconstitutional and void under the Constitution of Pennsylvania.' (Appendix, page —). And now, June 24, 1912, the rule for new trial and also the rule in arrest of judgment in the above stated case are discharged. To which same does the defendant except and an exception is sealed." (Paper Book, page —.)

By the Superior Court: The assignments are overruled. (Paper Book, page —.)

GERRY KINCAID,  
*Attorney for Defendant.*

WALTER JEFFREYS CARLIN,  
*Of Counsel.*

Endorsement: No. 272, Jan. Term, 1913. Supreme Court of Pennsylvania, Western District. Commonwealth vs. A. B. Crowl. Assignments of Error. Filed Aug. 1, 1913, in Supreme Court. Filed Mar. 29, 1913, Supreme Court, W. D. Kincaid & Kincaid, Attorneys-at-law, Corry, Pa.

215 In the Supreme Court of Pennsylvania, Eastern District.

No. 272, January Term, 1913.

COMMONWEALTH

v.

CROWL.

Appeal from Superior Court. (Q. S., Erie County.)

Filed May 22, 1914.

PER CURIAM:

The judgment of the Superior Court is affirmed on the opinion of Judge Henderson.

216 Supreme Court of the United States.

A. B. CROWL

VS.

COMMONWEALTH OF PENNSYLVANIA.

*Petition for Writ of Error.*

Considering himself aggrieved by the final decision of the Supreme Court of Pennsylvania in rendering judgment against him in the above entitled case, the said A. B. Crowl hereby prays a writ of error from said decision and judgment, to the Supreme Court of the United States and that an order be made fixing the amount of the supersedeas bond.

Assignments of error herewith.

WALTER JEFFREYS CARLIN,  
*Attorney for Appellant, Petitioner.*

SUPREME COURT OF THE UNITED STATES, ss:

Let the writ of error issue upon the execution of a bond by the said A. B. Crowl to the Commonwealth of Pennsylvania in the sum of Five Hundred Dollars: such bond when approved to act as supersedeas.

Dated October 5th, 1914.

MAHLON PITNEY,  
*Associate Justice of the Supreme Court of the United States.*

216½ [Endorsed:] Supreme Court of the United States. A. B. Crowl vs. Commonwealth of Pennsylvania. Original. Petition for Writ of Error. Walter Jeffreys Carlin, Attorney for Appellant Petitioner, 2 Rector Street, New York City, Borough of Manhattan.

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Copy.

UNITED STATES OF AMERICA, ss:

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Pennsylvania and A. B. Crowl and W. F. Lewis, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the

218 Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said A. B. Crowl as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifth day of October, in the year of our Lord one thousand nine hundred and fourteen.

(Signed)

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

Allowed by

(Signed)

MAHLON PITNEY,

*Associate Justice of the**Supreme Court of the United States.*

[Endorsed:] Supreme Court of the United States. October 191-. A. B. Crowl vs. Commonwealth of Pennsylvania. Writ of Error.

219 Know all Men by these Presents, That we, A. B. Crowl, principal, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact the business of indemnity and suretyship in the State of Pennsylvania, as surety, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of Five hundred dollars, to be paid to the said Commonwealth of Pennsylvania by its certain attorney, executors, administrators, or assigns: to the payment, well and truly to be made, we bind ourselves, our executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Twentieth day of October, the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of the Supreme Court of the Eastern District of Pennsylvania in a suit depending in said Court, between the Commonwealth of Pennsylvania, Appellee, and A. B. Crowl, Appellant, a judgment was rendered against the said A. B. Crowl and said A. B. Crowl, plaintiff in error, (appellant below) having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and citation directed to the said Commonwealth of Pennsylvania to appear and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That said A. B. Crowl, plaintiff in error, shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. CROWL, [SE]  
FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND, [SE]  
By HUGH M. ALLWOOD, [SE]  
*Attorney-in-Fact.*

Attest:  
JAMES R. KINGSLEY,  
*Attorney-in-Fact.*

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

Approved by—

\_\_\_\_\_

*Associate Justice of the Supreme  
Court of the United States.*

220 STATE OF NEW YORK,  
County of New York, ss:

On the 20th day of October, in the year 1914, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley and knew him to be the Attorney-in-Fact of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[Seal Fannie A. Massey, Notary Public, New York County.]

F. A. MASSEY,  
Notary Public, New York County, No. 2395.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kingsley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank A. Eickhoff, all of the City of New York, State of New York, be and each of them is, hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds or undertakings required or permitted in all actions or proceedings, or by laws required, permitted or allowed.

"Such bonds or undertakings to be executed for the Company by any one of the said Henry B. Platt, James R. Kingsley, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require."



## COUNTY OF NEW YORK, ss:

I, James R. Kingsley, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 20th day of October, 1914.

[Seal Fidelity & Deposit Company of Maryland, incorporated 1880.]

JAMES R. KINGSLEY,  
*Attorney-in-Fact.*

## Fidelity and Deposit Company of Maryland.

Statement June 30, 1914.

## Resources.

Home Office Building, Charles and Lexington Streets .....	\$2,375,000.00
Other Real Estate, 214 N. Charles St., etc. ....	128,636.88
Bonds and Stocks .....	6,228,578.62
First Mortgage Loans .....	109,034.00
Agents' Debit Balances, Gross (Surety) .....	805,338.02
Agents' Debit Balances, Gross (Casualty) .....	850,406.41
Bank Deposits for use of Branch Offices .....	99,991.45
Cash in Banks and Trust Companies .....	1,133,122.16
Total .....	\$11,730,107.54

## Liabilities.

Reserve for Unearned Premiums .....	\$3,383,203.31
Reserve for Claims, Admitted and Unadmitted .....	1,950,777.50
Reserve for Agents' Commission .....	387,805.51
Reserve for Premium Taxes, & Expenses in Transit .....	173,972.68
Reserve for Liquidation of American Bonding Company .....	82,206.24
Reserve for Liquidation of Philadelphia Casualty Company .....	58,114.44
Reserve for Unpaid Reinsurance Premiums .....	26,215.28
Capital Stock .....	\$3,000,000.00
Surplus .....	2,000,000.00
Undivided Profits .....	667,812.58
Surplus to Policyholders .....	5,667,812.58
Total .....	\$11,730,107.54

STATE OF NEW YORK,  
County of New York, ss:

James R. Kingsley being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of said Company, as of June 30, 1914, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 20<sup>th</sup> day of October, 1914.

[Seal Fannie A. Massey, Notary Public, New York County.]

F. A. MASSEY,

*Notary Public, New York County, No. 2395.*

220½ [Endorsed:] Supreme Court, Eastern Dist. of Pennsylvania. Between: Commonwealth of Pennsylvania and A. B. Crowl. Bond. I approve of the within Bond and of the sufficiency of the surety therein. Dated Oct. 26, 1914. Mahlon Pitney, Associate Justice of the Supreme Court of the United States.

221 UNITED STATES OF AMERICA, ss:

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the United States wherein A. B. Crowl is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this fifth day of October, in the year of our Lord one thousand nine hundred and fourteen.

MAHLON PITNEY,

*Associate Justice of the Supreme Court  
of the United States.*

ERIE, PA., October 22, 1914.

I, attorney of record for the Defendant-in-error in the above entitled case hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

J. ORIN WAIT,

*Attorney for the Commonwealth of Pennsylvania.*

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## Supreme Court of the United States.

A. B. CROWL, Plaintiff in Error,

VS.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

*Assignments of Error.*

Now comes the above named plaintiff in error (defendant appellant below) and files herewith his petition for a writ of error and says that there are errors in the records and proceeding in the above case entitled below as the Commonwealth of Pennsylvania against A. B. Crowl, appellant, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments:

The Supreme Court of Pennsylvania erred in holding and deciding that the Act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, being Public Law 63 of said State and particularly Section 4 of said Act which act is commonly known as the ice cream act, was constitutional and valid. The validity of such section 4 of said Act was denied and drawn in question by the plaintiff in error (defendant appellant below) on the ground of it being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Pennsylvania erred in holding and deciding:

First. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below), nor deprive him of liberty or property without due process of law, nor deny to him the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream under its own name, unless the said ice cream contained the percentage of butter fat required by section 4 of the said act.

Third. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, did not abridge the privileges and immunities of citizens or of the plaintiff in error (defendant below) nor deprive him of his liberty or property in prohibiting the sale of ice cream either under the name of ice cream or under any other name unless the said ice cream contain the percentage of butter fat required by section 4 of the said act.

Fourth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania and particularly section

thereof, did not establish an arbitrary classification and did not deny the plaintiff in error (defendant below) the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under any name unless the said ice cream contain the amount of butter fat specified in said section of said act and in dividing ice cream  
 224 into two classes, one of which contains fruit or nuts for the purpose of flavoring and the other which did not contain such fruit or nuts for flavoring, and requiring 8 per cent. of butter fat where fruit or nuts were not used for flavoring purposes and 6 per cent. where they were.

Fifth. That the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania, was not an arbitrary and unreasonable regulation and interference with a lawful business and did not abridge the privileges and immunities of the plaintiff in error (defendant below) nor deprive him of his liberty or property as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Sixth. That the Legislature of the State had the right under the Police Power to prohibit the sale of a wholesome article of food which was not a substitute for or an imitation of another product and absolutely prohibited the sale of such article of food, to wit, ice cream, unless the product conform to and contain the specified percentage of butter fat that section 4 of the act of March 24, 1909, of the General Assembly of the Commonwealth of Pennsylvania required and that the said act in so providing did not abridge the privileges and immunities of the plaintiff in error (defendant below) and deprive him of his liberty or property as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

For which errors the plaintiff in error (defendant below), A. B. Crowl, prays that the said judgment of the Supreme Court of  
 225 the Commonwealth of Pennsylvania dated and filed May 22, 1914, be reversed and a judgment rendered in favor of the plaintiff in error and for costs.

WALTER JEFFREYS CARLIN,  
*Attorney for Plaintiff in Error.*

225½ [Endorsed:] Supreme Court of the United States. A. B. Crowl, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Original. Assignments of Error. Walter Jeffreys Carlin, Attorney for Plaintiff in Error, 2 Rector Street, Borough of Manhattan, New York City.

226 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alfred B. Allen was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form. In Witness Whereof, I have hereunto subscribed my name this

twenty-ninth day of October one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thus subscribed, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 29th day of October one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

227 STATE OF PENNSYLVANIA,  
*Philadelphia County:*

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, do hereby certify that the above and foregoing is a true copy of the Record in the above entitled cause, as full and entire as appears of Record in said Court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this twenty-ninth day of October, A. D. 1914.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

Entered on error: File No. 24,434. Pennsylvania Supreme Court. Term No. 275. A. B. Crowl, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed November 2d, 1914. File No. 24,434.